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No. 9055

Vol 2221
see Vol 2220

In the United States Circuit Court of Appeals

For the Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO, (a municipal corporation),
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Reply Brief of Amici Curiae

FILED
APR 3 - 19[illegible]

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In the
United States
Circuit Court of Appeals
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CITY AND COUNTY OF SAN FRANCISCO, (a municipal corporation), *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 9055

Reply Brief of Amici Curiae

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1. SECTION 9 (S) OF THE RAKER ACT PROVIDES THAT SAID ACT MUST BE ACCEPTED BY CITY OF SAN FRANCISCO.

THE RAKER ACT SEEKS TO IMPOSE AN OBLIGATION OF ONE HUNDRED AND FIFTY MILLION DOLLARS AND MUST BE ACCEPTED BY THE ELECTORS BY A TWO-THIRDS VOTE.

At pages 67 and 68 of Appellee's brief it is stated that the appellant has treated section 6 of the Raker Act as a contractual covenant; that this contention is

fallacious and that the Raker Act is a law and that it is binding as a law upon the City of San Francisco.

We cannot agree with counsel.

Section 9 (s) of the Raker Act provides as follows:

> "That the grantee shall file with the Secretary of the Interior, within six months after the approval of this act, its ACCEPTANCE of the terms and CONDITIONS of this grant." (R. 34.)

This section above is a concession that the Raker Act is not to bind the City until the City files an acceptance with the Secretary of the Interior.

The Act contemplates binding the City to expend some One hundred and fifty million dollars.

No authority can impose such an obligation upon the City without its consent by a vote of the people of the City of San Francisco.

2. THE EXPRESS CONDITION OF THE RAKER ACT SHALL NOT INTERFERE WITH THE LAWS OF THE STATE OF CALIFORNIA RELATING TO THE CONTROL, APPROPRIATION, USE OR DISTRIBUTION OF WATER FOR MUNICIPAL OR OTHER USES.

Section 11 of the Raker Act provides:

> "That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relat-

> ing to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in CONFORMITY with the laws of said State." (R. 36.)

In this action the Secretary of the Interior is carrying out one of the provisions of this Act, to wit: Section 6 thereof.

In this suit the Secretary is not conforming with Section 18 of Article XI of the California Constitution which provides that a municipality cannot incur an obligation without a two-third vote of the electors.

This suit is violating Section 9, Article XII of the Charter of the City of San Francisco, which provides that the bonded debt of the said City shall not exceed twelve per cent of the assessed value of the property in the City.

A fair interpretation of this section 11 of the Raker Act would be that if the Act interfered with any mining claim or water right that the Act must give way to the mining locator, that if the Act interfered with Constitutional restrictions as to incurring obligations in carrying out the Raker Act, the Raker Act must give way. If Section 11 does not bear this construction then why was it placed in the Act?

This Section 11 means that right at the start an estimate of all expenditures to be incurred under this Act should have been submitted to a vote of the people;

this would have been conforming to the laws of the State of California.

Section 5 of the Raker Act provides that the work shall be diligently prosecuted and if not the grantee shall "FORFEIT" all rights *to any part of the project* not so prosecuted, and that the Attorney General on request shall bring suit to forfeit all rights.

Section 6 provides that if electrical energy shall be sold to a corporation for re-sale, that in case of an attempt to so sell the same, then "this grant shall *revert* to the Government of the United States." In this case "revert" means that it shall be forfeited. (R. 19.)

Section 9 (u) provides that the Attorney General shall commence suits "for the purpose of enforcing and carrying out the provisions of this Act." (R. 34.)

Three provisions are made for the violation of the provisions of the Act, First, Forfeiture, Second, Reversion, and Third, Action to enforce the provisions of the Act.

The remedy for selling to a corporation for re-distribution is a forfeiture of the whole grant.

This suit is brought under Section 9 (u) of the Raker Act, (R. 7) for the alleged purpose of enforcing the Act; that is the Government will stop the sale of the electric energy to the Pacific Gas & Electric Company until the City complies with the Raker Act and distributes its own electricity; this means that the Electors of the City of San Francisco will be compelled

by the United States to erect its own plant. This is coercion pure and simple.

This remedy is a forfeiture of the $2,000,000.00 received annually for the purpose of making the Electors of the City of San Francisco do something that they never agreed to do. Here we have the Court enforcing a forfeiture. The general rule is that a court of equity will not enforce but on the contrary will relieve from a forfeiture.

Dated: San Francisco, Cal.

March ...., 1939.

W. H. METSON,
E. B. MERING,
Amici Curiae.

No. 9055

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO (a municipal corporation),

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

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No. 9055

IN THE

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City and County of San Francisco (a municipal corporation),
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REPLY BRIEF FOR APPELLANT.

General comments on appellee's brief.

The brief for the Government in this case is a reflection of the attitude which it has assumed from the inception of this proceeding. It argues for a strained construction of the Raker Act, not designed to meet any proven theories of Congress with respect to the utilization of the public domain, or any theories of those charged with the administration of the Act prior to the ascendency to authority of the present Secretary of the Interior. Secretary Ickes' views as to the desirability of public as against private ownership of power distribution system are translated back twenty-five years, and are asserted to have been the views of Congress at the time the Raker Act was enacted. The only support claimed for the assertion, outside of the language of the Act, itself, is a single statement

made by Senator Norris in a debate on the bill, which happens to be in accord with the views of the present Secretary.

A strenuous attempt is made to shift, from the plaintiff to the defendant, the burden of proving whether or not the contract between the City and Pacific Gas and Electric Company is violative of Section 6 of the Raker Act. The Court is asked to disregard the express language of the contract to the effect that it is designed as an *agency* agreement. It is asked to apply to the various provisions of the contract every intendment against an otherwise permissible interpretation which would support the expressed intention. Where there is a clause that might with equal justification be included in either an agency or a sales contract, the Court is asked to construe that clause as *proof* of a *sale* rather than an *agency*. The factual basis for the recitals in the contract is ignored, as well as the assignments of error made by appellant which are predicated on the refusal of the trial court to admit testimony showing this factual basis.

And finally, still insistent upon the contention that the Raker Act is a *statute* as well as a *grant*, appellee refuses even to answer the powerful argument advanced by the City, based on uncontradicted facts, which show that the equities of the case are all against the form of remedy awarded by the trial court. In order completely to shut the door upon *any* form of *agency* agreement, which obviously, is the only means, that for many years can furnish a workable method of distributing Hetch Hetchy electric energy in San Francisco (even if the City should forthwith commence construction of or eminent domain

proceedings to acquire a publicly owned system), the Government contends,—*first,* that the language of Section 6 of the Raker Act should be strained beyond its recognized prohibitions of *sale for resale,* or *letting for subletting* purposes to include a prohibition of "allowing" or "permitting" an agent, during this interim period, to sell the energy *for the account of the City,* and, *second,* that, if the Court disagrees with this strained interpretation of the language of Section 6, but believes that the existing contract is not purely an *agency* contract (although with modification it could be made one), still the Court, regardless of equitable considerations, should refuse either to suggest what modifications should be made, or permit them to be made, and, thereby, enable the City to escape the ruinous consequences of the decree herein.

No proof of the intent of Congress

We are and always have been unable to account for the Government's attitude, as stated above. The facts before Congress at the time when the Raker Act was passed, of course, showed that the City had no distribution system then.

The Government has wholly failed to show any representations by the City to Congress that it would acquire a publicly owned distribution system. The Government has wholly failed to prove that Pacific Gas and Electric Company makes any unreasonable profit from the distribution of Hetch Hetchy energy under the contract;* that its rates are any higher than the City itself

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*Indeed the Government concedes (Appellee's Br. p. 13) that the Company receives "a reasonable return for the use of [its] property".

would charge its consumers if it were distributing this energy, or that the arrangement between it and the City permits it (a privately owned company) to make a profit out of publicly owned lands—contrary to the alleged intent of Congress.

It must have been obvious, at the time the Raker Act was passed, that the City could not construct the enormously expensive works required to utilize the waters of the Tuolumne river for water supply and electric energy, without letting contracts for construction work which would normally involve a *profit* to the contractor, and that the City could not acquire the vast quantities of material needed for the construction of this project without paying a *profit* to the sellers of the material. Pending the time when the City can and does acquire its own distribution system, we are unable to see any more vice in allowing a privately owned utility a reasonable return on its capital necessary for use, and actually used in the *distribution* of this energy, than in allowing another privately owned corporation a reasonable profit for building that system. Both profits must come, sooner or later, out of the pockets of the users of the electric energy, developed and transmitted through the construction and agency contracts.

If the Government had proven or made any attempt to prove that Pacific Gas and Electric Company was being paid an unreasonable profit for the use of its capital facilities, or that the electric rate payers of San Francisco were being charged unreasonable rates for Hetch Hetchy energy, perhaps some support would be lent to the Gov-

ernment's contention; but there is no such proof or offer of proof in this case.

The Government has adduced no evidence to show that the people of San Francisco are paying any higher rates for Hetch Hetchy water or Hetch Hetchy energy than if every item of operation were being performed by the City directly. So far as any proof in this case goes, even Senator Norris' interpretation of the Raker Act as quoted on pages 62 and 63 of appellee's brief is being complied with. There is no proof that the people of San Francisco are not getting cheap power. No private corporation is retaining or using the energy. *It goes directly to the consumer from the City's power house and transmission system through the Company's distribution lines.* The City is in competition with the power company in the generation of the energy and even in its distribution, because, to the extent that the City's energy displaces the Company's energy, it prevents the Company from distributing to San Francisco consumers the Company's *own* energy generated in its own power houses. It is a fair presumption that the Company would make more profit out of its own energy. The Government has offered no proof that the net realization of the City under the agency contract gives it less than a fair and even liberal profit on its relative investment. The City's profit is a public profit.

The Government, in this proceeding, has ignored the public policy of the United States in all of its Western Federal power projects. *Under all of them, private companies have been used as the media for distribution of*

publicly generated power to the ultimate consumers. In fact, there is not only no proof, but there is nothing in recent history of which the Court could take judicial knowledge to show that the City has contravened any *general* policy of Congress with respect to the utilization of public lands. On the contrary, the proof is all the other way. But, by a strained construction of the provisions of Section 6 of the Raker Act, by ignoring the actual language of that section, by ignoring, also, the beneficial intent of the Raker Act as a whole, and by ignoring, as well, the mandates of the Act, as set forth in Section 9 thereof (*which require the City to generate and sell energy*), the Government arrives at the conclusion that the present contract has not conformed, and that no permissible modification of it could make it conform to the *specific* Congressional intent, which is claimed to underlie the Raker Act. This *alleged* intent as already pointed out, is contrary to the *general* policy of Congress as exemplified in *all* Federal power projects.

Trial court's findings Nos. X and XI are conclusions.

The Government makes the astonishing contention, on pages 23 and 60 of its brief, that the interpretation of this contract amounts to a finding of fact by the trial court, amply sustained by evidentiary findings and by the evidence. This is followed by the contention that findings of fact so sustained should not be disturbed on appeal. In the findings of fact prepared by the Government there was inserted, over the City's objection and exception (Exception and Assignment No. 60), a conclusion of law by the trial judge that the contract of July 1, 1925,

is a contract of *sale for resale* purposes. (Findings Nos. X and XI.) This finding, the Government says, is conclusive on appeal if supported by evidence, and the evidence is the language of the contract itself.

In support of this contention the Government cites some authorities (Appellee's Br. p. 61):

The first of these cases is

Detroit Graphite Co. v. Hoover, 41 F. (2d) 490, 493 (C. C. A. 1, 1930).

In this case a jury was permitted to decide whether certain correspondence between the parties was tantamount to a termination of a contract. The contract itself was not construed by the jury at all. The Appellate Court held it to be a question of fact as to whether the contract was terminated or not by this correspondence.

In

Hoffman v. American Mills Co., 288 Fed. 768 (C. C. A. 2, 1923),

the Court said at page 772:

"It is settled that the construction of written contracts, whether embodied in a single instrument or in written correspondence, is a question of law for the court and not one of fact for the jury. * * * Where the entire contract is found in the correspondence between the parties, the trial judge must construe the same; but if it is partly written and partly parol, the question of *terms* is for the jury."

The case involved a finding whether plaintiff had merely exhibited a sample of twine or orally stated its dimensions and made a warranty with respect to the same, and whether the twine when delivered complied

with the warranty. We can find no principle in this case applicable to the situation at bar.

Swiss Bankverein v. Zimmerman, 240 Fed. 87 (C. C. A. 2, 1917).

In this case the jury was allowed to find the intent of the parties in directing a re-presentation of certain bank drafts. No contract at all was involved.

M'Namee v. Hunt, 87 Fed. 298 (C. C. A. 4, 1898).

This case involved an owner's liability for tort committed by the building contractor in blasting. Identically the same principles of law were announced by the Court as in *Hoffman v. American Mills Co., supra*.

Williston on Contracts, Section 616, holds that in an ambiguous contract where words have a special local meaning a jury may properly interpret them in view of the surrounding circumstances; but if the meaning of the writing is to be decided from the contract itself without any localized meaning to its language, and from the surrounding circumstances, the question is one of law for the Court.

We are unable to find that the Government's authorities (and these are all they have cited) in any degree sustain their contention that the trial Court's finding that the City's disposal of electric energy under the contract in question here was a sale and not an agency consignment, is conclusive on this appeal.

We submit, on the other hand, that no such weight is to be given to findings of this type, nor indeed to any of the other findings of the trial judge which amount to conclusions of law in an interpretation of the contract.

At the outset, we point out that in an equity case (such as this is), this Court hears and determines the case *de novo,* and is not *concluded* by *any* finding of the trial court, however much it may defer to the latter in respect of matters which are strictly *findings of fact* and have *substantial* evidence to support them.

> *Waterloo Mining Co. v. Doe* (C. C. A. 9), 82 Fed. 45;
>
> *Presidio Mining Co. v. Overton* (C. C. A. 9), 270 Fed. 388, 390;
>
> *Mt. Vernon Refrigerating Co. v. Fred W. Wolf Co.* (C. C. A. 6), 188 Fed. 164, 168;
>
> *Erhard v. Boone State Bank* (C. C. A. 8), 65 Fed. (2d) 48, 50;
>
> *O'Brien's Manual of Federal Appellate Procedure,* p. 57.

Apart from the rule that a Federal Appellate Court is not *concluded* by the findings of a trial court, *in an equity case,* it is clear that a so-called "finding" by a trial court with respect to the meaning and legal effect of a written instrument is not a *finding of fact* at all, but is a *conclusion of law,* inasmuch as questions respecting the construction and meaning of a written instrument are questions of law, and are *not* questions of *fact.*

In *Coles v. Somerville,* 47 Nev. 306, 220 Pac. 550 (1923), the first paragraph of the syllabus states the rule as follows:

> "Where a contract is in writing, the determination of the legal effect of the writing or the facts in creating an agency or sale is for the court."

At page 551, foot, it was said:

"The question for decision is: Is the agreement a contract of sale, or is it a contract of agency? **It is well settled that, where the contract is in writing, the determination of the legal effect of the writing, or the facts in creating agency or sale is a matter for the court.* Mechem on Agency (2d Ed.), § 50."

In 1 *Mechem on Sales*, § 50, it is said (p. 62):

"Where the contract is in writing or the facts are not disputed, the question whether the writing produced or the facts admitted operate to create a sale or an agency to sell is one of law to be decided by the court;"

In *Graham, et al. v. Sadlier*, 165 Ill. 95, 46 N. E. 221, the Court said (p. 222):

"*'What a contract means is a question of law. It is the court, therefore, that determines the construction of a contract * * * They [the court] give to the jury, as a matter of law, what the legal construction of the contract is, and this the jury are bound absolutely to take.'*"

See, also:

Equitable Life Assur. Soc. of the United States v. Wells, 101 Fed. (2d) 608;

Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285, 291, 66 L. Ed. 943, 946;

Brown Lumber Co. v. L. & N. R. Co., 299 U. S. 393, 397, 81 L. Ed. 301, 304.

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*Italics used in this brief have been supplied by writers unless otherwise noted.

Cases might be multiplied indefinitely upon this proposition, but it is so well known that we almost feel like apologizing for citing the few which we have cited.

The trial judge filed a written opinion wherein (after setting forth the [claimed] criteria of agency and the application of the same to the contract in evidence, all of which are fully discussed in appellant's opening brief, at pages 29 to 57) he stated (Rec. p. 125):

> "This opinion may stand in lieu of the written findings of fact and conclusions of law."

It was because of this statement in the trial court's opinion that the appellant reserved exceptions to certain matters in the opinion, and made the same the basis of assignments of error herein. It did so lest said matters might be claimed by the appellee to be findings of fact in respect of which the appellant was concluded, because it had failed to note an exception thereto or to assign the same as error. The Government in its brief (footnote p. 50) makes the claim that neither an exception nor an assignment of error can be based upon the Court's *opinion*. To this we agree, if the opinion be regarded simply as an opinion and not, as the Court, here, intended it to be, a combination of opinion and findings of fact and conclusions of law. If the purported findings of fact and conclusions of law in the opinion are to be given any effect, the appellant has protected itself against them by its exceptions and assignments. On the other hand, if the purported findings and conclusions, in the opinion, are to be treated as superseded by the findings of fact and conclusions of law subsequently signed and filed, then the appellant's exceptions and assignments to the statements

in the opinion, may be disregarded as superfluous because exceptions were taken and assignments made in respect of the same matters which were repeated in the written findings of fact and conclusions of law.

The trial court, however, signed the findings *as proposed by the Government,* apart from slight and unsubstantial changes. It is *these* "findings" (proposed by the Government and adopted by the trial court, almost without change) that the Government claims are *conclusive* upon this Court. The first question then is, what weight is to be given to such "findings", laying to one side the fact that this is an appeal in equity and, therefore, governed by the considerations which we have discussed above. Appellate courts hold that findings prepared by the appellee and merely adopted by the Court (particularly where, as here, they constitute findings of ultimate facts), do not carry the weight ordinarily attached to findings of a trial court. See *Brown v. United States,* 95 F. (2d) 487, 490 (C. C. A. 3, 1938).

In *Process Engineers, Inc. v. Container Corporation of America,* 70 Fed. (2d) 487 (C. C. A. 7, 1934) (Certiorari denied, 293 U. S. 588), the findings of the trial court, which had been prepared *in toto* by the prevailing party, were rejected on appeal where the Court made its own independent examination of the facts. The Court, in rejecting the trial court's findings (p. 489), said:

> "Such so-called findings do not help an appellate court. They reflect the views of counsel who submitted them and detract from the force and effect which are ordinarily given to findings made by the trial judge. When the abuse is aggravated (and the objectionable practice is growing), the assistance to

> the appellate court, which findings when carefully made by the trial court afford, is lost, and it becomes necessary for us to study the evidence as though no findings had been made by the District Court.''

In the light of the principles enunciated in the cases just cited and of the circumstances under which the ''Findings of Fact and Conclusions of Law'' herein were formulated and signed, we submit that this Court should interpret the contract in issue without giving undue weight to the interpretation of the District Court, or to its so-called ''findings'' respecting the nature of the contract.

Reply to the Government's interpretation of the contract.

We sufficiently set forth the City's position with respect to the application of the trial judge's criteria to the contract in question in appellant's opening brief. (pp. 29-51.) We reply here to such contentions made by the Government as have not already been answered therein and will distinguish the more important cases summarized in the Government's argument on its construction of the contract. (Appellee's Brf. p. 24 et seq.)

Government's authorities on sale versus agency not in point.

The Government has cited in its brief (pp. 23-27) a number of cases holding that the language of agency in an agreement does not, necessarily, constitute an *agency* contract if the obvious intent of the parties was to make a *sales* agreement. These cases, almost without exception, have arisen in bankruptcy matters where creditors were

seeking to attach or had already seized goods in the hands of a retailer, and a wholesaler or manufacturer was claiming a lien on the goods, or asserting that the proceeds of their sale was a trust fund for his benefit.

In such cases, the rights of others than parties to the agreement are involved, and the Courts are critical (as they should be) to make sure that such rights are protected. They even strain a point to protect the rights of the strangers to the contract, and, that, independent of the element of estoppel which is usually present. Here, however, the situation is entirely different. The rights of *no* third person are involved in this case, or affected by the contract under review. Both parties to the contract intended it to be one of *agency,* and so expressed their intent in the contract, itself. They still believe and are asserting that it is a contract of agency. *No creditor of either party is claiming otherwise.* Only the Government, *whose rights cannot be affected by any construction that may be put upon the contract,* is asserting that it is different from what it purports, upon its face, to be, and what the parties to it are still asserting that it is. We repeat, the circumstances of the present case are essentially different from the circumstances in the cases upon which the Government relies, in all of which, persons, other than the parties to the contract, were claiming a lien upon or rights in the proceeds of goods which were the subject matter of the contract under review.

Standard Co. v. Magrane Houston Co., 258 U. S. 346, 66 L. ed. 653 (1922) (Appellee's Brief p. 24), was a case of the latter type. It involved an exclusive agency agreement for standard dress patterns which was claimed to be void

as a violation of the Clayton Act. The petitioner claimed it was a joint venture or agency. The Supreme Court held (p. 354) that inasmuch as the agreement called for outright purchase, transfer of title, and dominion to the buyer, the term "agency" as applied to the agreement was a misnomer. In short, the agent was merely the sole local store at which the petitioner's goods could be bought by the public. In that case, the agent was allowed to sell dress patterns, which were delivered to it, *at any figure it desired in excess of minimum prices which it was required to pay to the seller,* and was forbidden to handle any competing patterns. The seller made no attempt, in its contract, to prescribe either the amount or the means by which the selling price was to be determined.

In *Coweta Fertilizer Co. v. Brown,* 163 Fed. 162, 165 (C. C. A. 6, 1908) it was conceded by counsel for both parties, that the contract was one of sale, not agency. The sole contention made by the petitioner was for a conditional sale lien on property which it had sold and delivered to the bankrupt. The attempt on the part of a seller to retain title to merchandise, sold to a retailer, as against creditors of the latter, by means of a conditional sales contract, was expressly made illegal under the laws of Tennessee (where the litigation arose). The retailer had no right to return unsold goods, and assumed all risk of loss.

In *In re Rabenau,* 118 Fed. 471 (D. C. W. D. Md., 1902), a similar situation existed; the consignee assumed all losses, and took delivery of goods f.o.b. factory; he was required to account to the seller for certain minimum prices, *and could sell at any price in excess of those and retain the entire proceeds.*

In *In re Linforth,* 15 Fed. Cas. No. 8369, page 558 (C. C. Cal. 1877), a similar situation was present. The Court said, "It is a consignment of goods *to be paid for at a price agreed upon,* and which bore *no relation* to the prices at which consignees made sale, or the amounts they might be able to collect". The Court held (and properly) that the transaction was a sale, and not a *true* "consignment".

In *Chickering v. Bastress,* 130 Ill. 206, 22 N. E. 542 (cited several times in appellee's brief), an identical holding was made in reference to sale of pianos on "consignment". An attempted reservation of title in the consignors was held void *as to creditors of the consignee.* The same situation is true of all the remaining cases cited on pages 25 and 26 of appellee's brief.*

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*Other cases are cited by the Government in the footnote to its brief, page 60. Typical of them are:

Standard Co. v. Magrane-Houston Co., 258 U. S. 346, already discussed, pages 14-15, *supra.*

Howard v. Hancock Oil Co., 68 F. (2d) 694 (C. C. A. 9, 1934).

This was an oil sale contract where parties designated in the contract as *buyer* and *seller* agreed therein to buy and sell certain oil. It was held in a bankruptcy suit that the seller could not convert this contract into an agency by claiming that it was retaining title as security until after the oil was gauged. The Court emphasized the effect of the use of the proper *words* for a sales contract as lending weight to its equitable conclusion that it should be held a sales contract as against creditors of the purchaser.

The decision in principle is authority for a like emphasis to be placed upon the words of *agency* used in the contract at bar in determining its characteristics.

Donlan v. Turner, Dennis & Lowry Lumber Co., 282 Fed. 421 (C. C. A. 9, 1922).

Here again was a contract entitled "Contract of sale", the parties to which were called vendor and vendee. They agreed to sell and buy. Notes were taken in payment. The Court said, at page 424, "but we are constrained by the definite language used by the parties", and held the contract to be one of sale.

This case also is authority for the City's contention that the definite language of agency used in the contract at bar should add great weight to its construction as an agency contract.

In re Leflys, 229 Fed. 695 (C. C. A. 7, 1916).

This case is almost identical in fact with the *Standard-Magrane-Houston* case above noted. No price was fixed except the minimum price.

The same criticism applies to all the remaining cases cited on page 60 of appellee's brief.

We are unable to see what bearing any of the above mentioned cases has on the situation at bar. The City does not convey *title* to its electric energy to the power company, and it transfers possession only for the fraction of a second necessary to transmit the energy from Newark to the consumer's meter. The energy is sold the instant that the consumer turns his switch and receives it. Delivery and sale are accomplished at the same instant and by the act of the consumer.

The manner in which the price of the electric energy is fixed in the contract of July 1, 1925 is no evidence of a sale to the Company.

In view of the fact that the City's energy must be commingled with the millions of kilowatts of energy furnished by the power company from its own sources, which are necessary to supply the *total* demand of consumers, the City was compelled, out of practical considerations, to provide in the contract that the prices at which the energy should be sold should "not exceed the *lawfully established* rates" (Rec. p. 81) (i. e., those fixed by the Railroad Commission of California), so that the City might receive the same price for its energy as the power company would receive for its own energy which it supplied to the identical consumers. This arrangement was satisfactory to the City, *as seller of the energy to the cosnumer.* It was not a delegation to the power company of control of the selling price. The contract (and not the power company) fixes the price and requires that accounting shall be based on the price so fixed.

The contract basis of accounting is not a sale price.

Much criticism is attached by the Government to the fact that the price received by the City is a percentage of the *weighted average price* per kilowatt hour which the company collects from consumers rather than a percentage of the price collected on *each individual sale*. And the Government makes this criticism despite the fact, as we have pointed out, that the kilowatts could not, under any conceivable circumstances, be segregated. The Government has not proved for instance, except to the extent of $25,000 over twelve years of operation (i. e., less than one-tenth of one per cent of the City's total return), that the price which the City receives is not the true percentage of the weighted average price actually collected by the power company.

The contract required that it should fluctuate with changes in rates. The Government says (Brief p. 41) that this provision of the contract is ambiguous. However, the parties to the contract have had no difficulty in interpreting it. It is clearly susceptible of the interpretation which the parties have given it. Moreover, the Government is not injured in any way, by their interpretation. In the circumstances, we submit that the Government's criticism of the contract in this matter is without merit, and does not even tend to show that the parties' interpretation of the disputed provision is incorrect.

That the provision of the contract which requires the sale price of the electric energy to be fixed in conformity with the laws of California (i. e., by the Railroad Commission), is, in practical effect, a *fixing of price by the*

City, as principal, is further established by the provisions of Sections 14-B, 15 and 63-B of the Public Utility Act of California. (General Laws of California, Volume 2, pp. 3130, 3131, 3174.) It will there be seen that all public utilities are required to file their rate schedules with the Railroad Commission, that the Commission has power to determine and prescribe the rates chargeable by these utilities, and that the rates so prescribed *shall not be changed except on order of the Commission, made and entered after a hearing.* The suggestion in appellee's brief (p. 52) that these rates are *maximum* rates is, thus, refuted by the language of the Public Utility Act. The legal authority of the City to agree to rates fixed by the Railroad Commission is contained in the California Statutes of 1915, page 1273, Section 1. (General Laws of California, Vol. 2, Act 6388, p. 3185.) It follows from this, that the City, in adopting the rates which should be fixed by the Railroad Commission, was acting, not only in accordance with the factual requirements of the situation, but in strict conformity with authority vested in it and in the Railroad Commission, by the laws of California.

While Paragraph *First* of the contract states that the charges to consumers "shall not *exceed* the lawfully established rates", it is evident that this provision (read in conjunction with the above cited sections of the Public Utilities Act, which were in effect at the date of the contract), requires that the rates fixed by the Railroad Commission shall govern. This construction is also borne out by the provision of Paragraph *Eighth,* which requires rates to *increase or decrease* proportionately to the then "*established* rates". "Established", by whom? By the

state's rate-fixing authority, which is the Railroad Commission.

It should be noted, further, that, in Section 9 (o) of the Raker Act, the Congress required that all charges made by the grantee for the sale of power for consumer purposes *must conform to the laws of the State of California.* The "laws of the State of California" vest rate fixing power in the Railroad Commission.

From the foregoing, it is clear (so we submit) that there is no merit in the appellee's argument that title to the energy, which is the subject matter of the contract of July 1, 1925, is vested in the Company, because the Railroad Commission's rates which govern in respect of the contract, apply also to Company-owned energy.

Undoubtedly, such adjustments should be made, in the Company's accounting to the City, as are consistent with changes in the average rate per kilowatt hour received by the Company in accordance with the rates fixed from time to time by the Railroad Commission. *The contract requires this, and both parties to it are willing that such correction in accounting should be made.* The fact that the contract's requirement in this regard has not been strictly followed by the parties, can not affect the validity of the contract, or furnish any ground for enjoining its continued operation and/or the disposition of energy under it. We submit that a court of equity should lend its powers to the preservation of an agreement which has been highly beneficial to the City as principal, apparently satisfactory to the Company as agent, and, so far as this record is concerned, has been without complaint from consumers of electric energy, rather than to

use such powers to destroy the agreement, through a strained construction of its provisions, designed to bring them in conflict with Section 6 of the Raker Act.

The attempt to base the decision of this case on authorities involving contracts for the sale of tangible personal property necessarily fails in logic, because of the difference in the character of the goods and the methods by which it is physically possible to handle them, and because, as well, each case rests upon its own facts. In one set of cases, the delivery to and acceptance by the consignee, under one of many possible optional arrangements, may indicate an intention to make a *sales* contract, notwithstanding attempts to cloak this intention. Under another set of circumstances, the physical facts attendant upon the transaction may show that the parties intended to do precisely what their agreement states to be their intention, i. e., to make an *agency* contract, and may entirely remove any suggestion of an intent to make a *sales* contract under the guise of an *agency* contract. In every case, the question is what was the *real* "intent" of the parties?

Energy losses fall on the City, not the Company.

The Government throughout its brief (see particularly, pp. 38-39) contends that the contract in question is a contract for the *sale* of *76* per cent of the City's energy for a fixed price of 26.935 per cent of 2.383 cents per kilowatt. This contention is not borne out by the facts of the case, or by the language of the contract. In a case such as the present, where the Company is selling energy to consum-

ers, *for the City's account,* and supplementing that energy with an amount, generated in its own plants, sufficient to meet consumer demands, it must be apparent that the loss of energy necessarily incurred in transmitting, stepping-down, distributing and metering the same cannot be ascertained by merely summing up the readings of the consumers' meters and subtracting the reading at the City's meter at Newark. It was possible, however, for competent engineers to ascertain, with reasonable exactness, just what energy loss occurs in transmitting energy from Newark to San Francisco consumers, *in terms of percentage of any given quantity so transmitted.* This percentage would cover an element of *average* loss, resulting from conductor resistance, transformer losses and meter inaccuracies. It necessarily varies with fluctuations in the volume of energy transmitted, but taken over a period of time it is susceptible of accurate measurement. *Prior to the execution of the contract of July 1, 1925, this loss had actually been measured by the Company and found to be 24 per cent.* To this fact is due the requirement in the contract for the deduction of 24 per cent of the amount of energy delivered *at Newark,* in computing the amount of energy delivered *at San Francisco* which is the basis of return under the contract. This figure was stated to be in conformity with actual experience, according to the witness Ellis. (Rec., pp. 432-434.) These facts made at least a *prima facie* showing that the City, (as owner of the energy) agreed to a deduction of *actual losses only,* in the Company's accounting, and that it fixed the amount of such *actual* losses in the only practicable

manner (i.e., *by actual experience)*; moreover, the Government made no attempt whatever to overcome the City's showing with respect to the losses. There was no showing, for example, that the conditions of delivery subsequent to 1925, when the contract was made, were any different from those that obtained at that time. Such being the case, the Court could have no basis for assuming that the 24 per cent deduction does not represent the *actual* average loss of energy between Newark and San Francisco, which is properly deductible in any accounting by the Company as agent of the City. The ascertainment of such losses by estimate based upon investigation (as in this case) was upheld as proper in *Utah Power and Light Co. v. Pfost,* 286 U. S. 165, 190, 76 L. Ed. 1038, 1051 (cited at page 38 of Appellee's Brief). Thus, the facts and the law *refute* the contention of the Government that the figure of 24 per cent stated in the contract as the amount of transmission losses is an "arbitrary" figure.

In *Donlan v. Turner, Dennis & Lowry Lumber Co.,* 282 Fed. 421 (C. C. A. 9, 1922), (cited several times by Appellee) the Court said, with respect to the general rule that loss follows title (p. 424):

> "But the rule is not without exceptions, for not infrequently are valid agreements made where the property is in one and the risk in another".

From this it follows that the *possibility* that the Company *may,* also, sustain *some* loss (unproven and nonexisting as far as the evidence indicates) would be insufficient to indicate a sale to the Company, under the contract of July 1, 1925.

An agency agreement does not violate Section 6.

If the contract is one of agency it is not forbidden by Section 6 of the Raker Act. We have already pointed out that the attempt of the Government to strain the language of Section 6 by interpreting "selling or letting" to include any form of physical transfer, is not justified either by the evidence in the case or by any logical construction of the intent of Congress derivable from examination of the language of the Act, and the circumstances existing at the time it was passed. The Government insists that this prohibition, necessarily, forbids the right to sell *as agent,* since (so the Government says, Brief p. 27), "the agent must control the output of the City's plant and thus destroy competition". Again, the Government says (Brief p. 27), "Even if the contract be deemed one of agency, it was within the ambit of Section 6, since it granted to the Company, *for a consideration* the right *as agent* to sell the energy". (Italics ours.)

The Government's argument that the contract of July 1, 1925 should be held to be one of "sale" rather than "agency" because the Company has a "control" over the electric energy, lacks foundation either in fact or in law.

The first of the above quoted excerpts from page 27 of the Government's brief is absolutely a *non-sequitur,* and the cases cited to support it do not do so. *The agent does not control the output of the City's plant.* The City, *through its contract,* controls the acts of the agent, and

the consumer's demand for electricity determines the rate of demand for the City's product.

Even if the contract of July 1, 1925 purported to grant *control* over the energy to the agent (which it does not) this fact would not convert the contract into a *sales* contract.

In *"Restatement of Agency"*, Vol. 1, § 14, sub. (b), it is observed (p. 48) that a person may contract with an agent *"not to exercise control."* In fact, one of the chief distinctions between an *agent* and a *servant* is that the *agent,* ordinarily, enjoys *freedom from control,* in respect of the manner in which he carries out the business of his principal, whereas the *servant* is usually restricted in the manner of his operations. *In this connection, it should be observed that much of the confusion in the Government's argument results from applying to the relation of principal and agent the rules that apply to the relation of master and servant.* This is a fatal defect in the Government's argument.

It is well recognized that an agent authorized to effect sales on behalf of its principal may fix the *price, terms* and *conditions* of sale.

2 *Am. Jur.,* p. 98, "Agency", § 120;
Mechem on Agency, § 854;
Mechem on Agency, § 2503 (referring to factors);
2 *Cor. Jur. Secundum,* p. 1319, "Agency", § 114 (bb);
2 *Cor. Jur. Secundum,* p. 1321, "Agency", § 114 (ee).

It is, also, well recognized that the agent is frequently authorized to "select the purchaser" and fix the "time and place of delivery".

Mechem on Agency, § 854;
2 *Cor. Jur. Secundum,* p. 1322, "Agency", § 114 (ff).

In 2 *Am. Jur.,* p. 98, "Agency", § 120, the author points out that an agent with general authority to effect sales is deemed to have ostensible authority "to fix the terms of sale, including the time, place, mode of delivery, and the price of the goods, and the time and mode of payment".

Many other illustrations might be adduced to point out the distinction between an *agent* and a *servant,* and, thus, to make apparent the underlying fallacy in the Government's argument as applied to the contract here in issue, but we believe that those already given are sufficient for the purpose.

It is *physically* possible, of course, for the Company's load dispatcher to throw out the Hetch Hetchy switch and stop delivery of the City's energy, just as it might be possible for any agent to give away or destroy his principal's goods, *but such action would have no effect upon the contract or the rights of the City under it.* The Company's load dispatcher cannot destroy the liability of the Company to account to the City, *in strict conformity with the terms of the contract,* which is all that the law requires.

The contract does not destroy municipal competition.

Competition, to the extent that the City is in a position to compete, is not destroyed, but, rather, is promoted by its agreement with the Company. Not only do the rate payers have the protection of the California Railroad Commission under the terms of the contract, but the City can terminate the contract on *one* day's notice. The Company is required by force of circumstances, resulting from this contract, to sidetrack its own power development and transmission *in order to give preference to the City's electric energy.* If this is not competition, then we do not correctly understand the word. If, indeed, there is any suppression of competition, under the contract, it is *by favoring the City's product,* as against the Company's product.

It will be physically possible for the City to *supplant* the Company, in the *distribution* of electric energy, if and when it is financially able to and does construct its own distribution system, with the approval of its electorate. But such *competitive* distribution is not required by either the words or the intent of the Raker Act. Moreover, that will be *no* competition, if the City should acquire *the Company's distribution system.* It is not claimed that the City made any representations that it would go into the power distribution business in San Francisco, with a municipally owned plant, at the time it obtained the grant from Congress. We may be sure that if the Government knew of any such representations, it would have introduced evidence respecting them. Counsel quotes

(Brief, p. 62) the report of the Public Lands Committee of the House of Representatives to show that the provisions of Section 6, acquiesced in by the City, were designed to prevent any monopoly or private corporation from obtaining control of the *water supply* of San Francisco. Counsel for the Government says that what was said about "water" is equally applicable to electric energy. We think it very significant that the words "electric energy" were *not included* in the Committee's report. *The clear inference is that the City made no representations with respect to electric energy.* As pointed out in our opening brief (p. 9) the court below excluded all testimony showing what was the intended use of the electric energy at the time the Raker Act was passed.

The cases cited by counsel for the Government (Brief, p. 27), in support of its strained construction of Section 6 of the Raker Act, clearly bear no relation to the points sought to be made. *Speigle v. Meredith,* 22 Fed. Cas. No. 13,227, page 911, merely holds that a sale of lands in consideration of bond coupons is a sale *for a consideration.* In *Borland v. Nevada Bank of San Francisco,* 99 Cal. 89, the question was whether the stock was *sold* to the bank, or taken by it *as collateral.* The Court held that there was no agreement at all with respect to the stock deposited with the bank. The relevancy of these authorities is not apparent to us.

Section 6 is not enforceable as a statutory provision.

The argument to the contrary has been adequately answered in our opening brief. (pp. 57-72.)

We refer, in passing, to those of the cases cited by the Government (Appellee's Brief, p. 27) which were not discussed in our opening brief.

Wisconsin Central Railroad Co. v. Forsythe, 159 U. S. 46, 40 L. ed. 71 (1895), involved the right of Congress to grant certain reserved lands. The case is authority for holding that the intent of Congress is to govern, but the Court states (p. 55):

> "* * * To ascertain that intent we must look to the condition of the country *when the Acts were passed,* as well as to the purpose declared on their face, and *read all parts of them together.* (Citing cases.)
>
> "In order to determine the intent of Congress we must look at the situation at the time the Act of 1864 was passed." (Emphasis supplied.)

This principle is exactly what we have endeavored to introduce into this case by proffered evidence as to the status of the City's Hetch Hetchy project and the intended use of the energy at the time the Raker Act was passed, as compared with the conditions existing at the time the contract in issue was made. All of this evidence was excluded by the Court below, and to this exclusion error has been assigned. (Assignment No. 24.)

We also call the attention of the Court to the intention of Congress as expressed in Section 11 of the Raker Act, where it is stated that "nothing herein contained shall be construed as affecting *or intending to affect* or *in any way to interfere* with the laws of the State of California relating to the control, appropriation, *use* or distribution of water used in irrigation or for *municipal* or other uses

or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State''. The laws of California permit the City to use its water for generation of electricity for sale in the manner contemplated under this contract. The contentions of the Government with respect to Section 6 would nullify this legal right given to the City by California law, and amount to a contravention of the provisions of Section 11.

A grant for a valuable consideration should be liberally construed in favor of the grantee.

In view of the fact that the grant of rights and privileges made to the City by the Raker Act were compensated by the payments made and obligations assumed by the City, the value of which the City offered to prove was ten times the value of the rights and privileges granted to the City (Rec. p. 314, 321), the Raker Act should not be construed as one making a pure gift, but, on the contrary, should be liberally construed in favor of the City.

In *Burke v. Southern Pacific Company,* 234 U. S. 669, 58 L. Ed. 1527 (1914) dealing with a land grant the Court was at pains (p. 1544, col. 2) to point out that the grant was not merely a *gift* which ''should be construed and applied accordingly'', but that, on the contrary, it was a *grant upon consideration,* to be construed as such.

In the famous Charles River Bridge case, i. e., *The Charles River Bridge v. The Warren Bridge,* 11 Pet. 420, 9 L. Ed. 773 (1837), it is said (p. 828, col. 1, ft.):

> ''The general rule is that 'a grant of the King, at the suit of the grantee, is to be construed most beneficially

> for the King; and most strictly against the grantee;' but grants obtained as a matter of special favor of the King, *or on a consideration* are more liberally construed."

In *Washburn on Real Property,* 6th Ed. (Vol. 3), Section 2020, p. 173, the author, after stating the rule of strict construction which *ordinarily* applies to public grants, says that the rule applies in cases of uncertainty or ambiguity in the terms of the grant, but is inapplicable "where the grant is for a valuable consideration".

The City is not estopped to question the constitutionality of Section 6.

The Government states (Brief, p. 27) that the City has accepted the substantial rights conferred by the Act and is now estopped to question its constitutionality. We agree with this proposition so far as the statute as a whole is concerned. But the City is not attacking the constitutionality of the statute *as a whole.* The City's position is that if Section 6 shall be construed as the Government would construe it (i.e., as a statutory provision preventing the City from disposing as it sees fit of its own electric energy generated in it own power house, with its own water, and transmitted over its own distribution system) then *that section alone* (and *not* the entire Raker Act) is unconstitutional, because Congress is without power to regulate *purely local affairs.* The very authorities cited by the Government hold this.

In *Daniels v. Tearney,* 102 U. S. 415, 26 L. Ed. 187 (Government Brief, p. 72), the Supreme Court said (p. 419):

> "The cases are numerous in which it has been held that where a bond contains conditions, some of which are legal and some illegal, and they are *severable and separable* the former may be enforced and the latter disregarded".

In the *Tearney* case the Court held that the bond involved was *indivisible*.

The rule is different, however, where the provision attacked is clearly *separable* from the provisions by which benefits are conferred upon the attacking party. This distinction was recognized and applied in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. Ed. 510, the pertinent syllabus in which reads as follows:

> "A private party is not estopped to attack provisions of a statute that are harmful to his interests merely because he sought the enactment of other and separable provisions in it, beneficial to him in an incidental way, but neither relied on by him nor brought in question, in the litigation."

In the opinion, the Court, referring to benefits conferred by a statute, the acceptance of which by the plaintiff was claimed to preclude him from attacking the constitutionality of portions of the statute, said (p. 81):

> "Those benefits result incidentally from the enactment of other provisions of the Act, the constitutionality of which is not questioned, *and which seem clearly separable from the sections here challenged.*"

It certainly cannot be held that Section 6 of the Raker Act has any necessary relation to the rest of the grant and is *inseparable* therefrom. In fact, Section 6, if con-

strued in accordance with the Government's contention, would prevent the City from generating and selling the maximum amount of energy which can be developed on the project, as the City is required to do by Section 9(m) and (n) of the Act.

The cases cited by the Government to support its argument that the City, by accepting the benefits of the Raker Act, is estopped to question the constitutionality of a *separate* (and, as here, *collateral*) provision of the grant are clearly distinguishable as will appear from the brief review of them which we now make.

In *Grand Rapids & Indiana Ry. Co. v. Osborn*, 193 U. S. 17 (Appellee's Brief, p. 72), it was held that a railroad corporation which had applied for state incorporation and had accepted a charter requiring it to submit to statutory rates prescribed by the state legislature was estopped to claim that the rates prescribed were unconstitutional.

In *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407, (Appellee's Brief, p. 72), a dissenting minority shareholder who had begun a *statutory* valuation proceeding to force purchase of his stock by a corporation about to sell its assets, was held, *by invoking the statute,* to have waived the right to challenge it validity.

In *St. Louis Co. v. Prendergast Co.*, 260 U. S. 469 (Appellee's Brief, p. 72), the plaintiff, which had connected its property with a public sewer under permit from a sewer district, was held estopped to challenge the constitutionality of an order of the district, which levied a tax to defray the cost of the sewer.

In *North Dakota-Montana W. G. Association v. United States,* 66 Fed. (2d) 573 (Appellee's Brief, p. 72), the defendant had accepted loans under the Agricultural Marketing Act, and was held estopped to deny the constitutionality of certain provisions of the Act which limited the amount of set-offs against the Government's claims for repayment.

In *American Bond & Mortgage Co. v. United States,* 52 Fed. (2d) 318 (Appellee's Brief, p. 72), the holder of a permit for a radio station license, was held estopped to assert rights which he surrendered *voluntarily,* in order to get his permit.

In *Booth Fisheries v. Industrial Commission,* 271 U. S. 208 (Appellee's Brief, p. 72), an employer who had, voluntarily, accepted benefits under Wisconsin's Workmen's Compensation Act, was held to be precluded from challenging the constitutionality of the Act.

Fox River Co. v. Railroad Commission, 274 U. S. 651 (Appellee's Brief, p. 72), involved the validity of a recapture clause in a state dam permit.

Steward Machine Co. v. Davis, 301 U. S. 548 (Appellee's Brief, p. 73), holds that the Federal Social Security Act was valid in allowing employers in a given state, credit for unemployment taxes, paid to that state, only if the state law conformed to the Federal Act.

We repeat that the foregoing brief review of the cases cited by the Government to support its contention that the City cannot accept the benefits of the Raker grant and at the same time object to the constitutionality of Section 6, demonstrates that said cases are clearly dis-

tinguishable. In none of them was a party attacking a provision of a statute which was *separable* from other provisions upon which he relied, or which had conferred upon the attacking party benefits which he had accepted.

Moreover, we are not aware that the doctrine of estoppel to complain of the unconstitutionality of a statute has ever been applied to a state or to one of its political subdivisions, such as the City and County of San Francisco. The Government, or anyone else, dealing with a municipal corporation is put on notice of the limitations upon the powers of its officers, and the doctrine of ostensible agency has no application when those officers exceed their lawful power.

In this connection, see *Loan Association v. Topeka,* 87 U. S. (20 Wall.) 655, 22 L. Ed. 455, where it was held that the City of Topeka might attack the constitutionality of a bond issue created by the Legislature of Kansas, notwithstanding that the town authorities had received money for the bonds and had paid one installment of interest thereon. It was held that such payment worked no estoppel.

See, also:

Town of South Ottawa v. Perkins, 94 U. S. (4 Otto) 260, 24 L. Ed. 154.

As pointed out in our opening brief (p. 86), the City of San Francisco had no authority, either under its charter or under the Constitution of California, to permit the Congress of the United States, or the Secretary of the Interior, to regulate the manner, price, or terms under which it should dispose of municipally owned electric

energy. Thus, there could not have been a valid acceptance of the provisions of Section 6, if that section means what the Government now says it means.

None of the cases cited by the Government is authority for the proposition (without the establishment of which the Government's argument on the question of estoppel must fail) that a legislative tribunal which acts wholly without the scope of its jurisdiction in respect of certain provisions of a legislative act (and that is the claim here made by the City) may, nevertheless, estop a beneficiary under said Act from attacking the constitutionality of *separable* provisions of the Act, which clearly lie outside its jurisdiction, merely because the attacking party has accepted benefits under portions of the Act which were clearly within the law-making power. In the cases cited by the Government,* the Sewer District had a clear right to levy a tax for sewer construction, and the State of Wisconsin had a clear right to enact a Workmen's Compensation Act, but the Congress of the United States had neither the right nor the power under the Federal Constitution, to regulate the City and County of San Francisco or prescribe the manner in which it should dispose of its own electric energy.

What has just been said brings this case within the principle enunciated in *Frost Trucking Co. v. Railroad Commission,* 271 U. S. 583 (Appellee's Brief, p. 77), in which the California Contract Truck Hauler Regulation Act was held to be invalid. The Court held that the State could not impose an *unconstitutional restriction* upon the

**St. Louis Co. v. Prendergast Co.* and *Booth Fisheries v. Industrial Commission, supra.*

use of property, *as a condition to doing a lawful business.* The restriction assailed was not one imposed in connection with the state's undoubted right to regulate the use of highways (a matter within its legislative power), but rather one imposed on the right to conduct a private trucking business, which, it was held, could not, constitutionally, be converted into a public utility without the consent of the operator, even though physically, and as a corporation, the operator was within the state's jurisdiction.

If the restriction had been one related to the use of public roads (such as the statute involved in *Stephenson v. Binford,* 287 U. S. 251 [cited by the Government at page 79 of its brief]), the restriction would, undoubtedly, have been held valid.

Similarly, the Federal Government may not extend its jurisdiction over the corporate business of San Francisco, *in matters wholly unrelated to the use of public lands,* merely because the water storage division of the City's project is within National park and forest reserves.

The restriction sought to be enforced upon the City is something not within the power of Congress to impose, and the City is not estopped from objecting to it. An entirely different question would be presented, if the assailed provision were one, clearly, within the congressional power.

There is another answer to the argument that the City is estopped to assert the unconstitutionality of Section 6 of the Raker Act, if its true meaning be that now claimed by the Government.

The conditions operating at the date of the enactment of the Raker Act and when the City accepted the benefits of the Act, are far different from those which later developed. As we pointed out in our opening brief (p. 9), the City attempted to show, but was prevented by the trial court from showing, that, at the time of the enactment of the Raker Act, the plans of the City were such that it was believed that there would be very little surplus electric energy for disposition under the terms of the Raker Act; as the result of conditions which developed later, this situation was changed. What might have been a non-burdensome restriction at the time of the enactment of the Raker Act has, by reason of subsequent circumstances, become utterly destructive of the City's investment. The acceptance of benefits under a statute in a given set of circumstances has been held not to create an estoppel later when the circumstances have greatly changed.

> *Abie State Bank v. Bryan,* 282 U. S. 765, 775, 75 L. Ed. 690, 703.

Furthermore, in so far as the provisions of Section 6 of the Raker Act may be said to be mandatory upon the City, the latter can not be said to have waived its rights to question the constitutionality of the provisions, by accepting the benefits of *other* provisions of the Act.

> *Obrecht-Lynch Corporation v. Clark,* 30 Fed. (2d) 144, 146, citing *Hawkins v. Bleakly,* 243 U. S. 210, and *Booth Fisheries v. Industrial Commission,* 271 U. S. 208, 70 L. Ed. 908, which latter case is one of the cases cited [Appellee's Brief p. 72]

by the Government in support of its argument that the City is estopped to deny the constitutionality of Section 6.

Section 6 of the Raker Act is not a provision for the protection of public lands and the cases cited to sustain the proposition that it is, do not do so.

The Government (Br. p. 77) makes the contention that Congress in disposing of the public domain may impose *any condition whatever* that it deems necessary for its protection against private exploitation. We shall not quarrel with this contention except to point out certain obvious limits to its application. Some of these limits are quite fully indicated in the case of *Ashwander v. Valley Authority,* 297 U. S. 288, upon which the Government greatly relies in its brief. (pp. 74, 76.) In reference to the power of Congress over public property of the United States, it was said in that case, at page 338:

> "* * * The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course, must be an appropriate means of disposition according to the nature of the property, it must be one adopted in the public interest as distinguished from private or personal ends, and we may assume that *it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States.* See Kansas v. Colorado, 206 U. S. 46. In this instance, the method of disposal embraces the sale of surplus energy by the Tennessee Valley Authority to the Alabama Power Company, the interchange of energy between the Authority and the Power Company, and

> the purchase by the Authority from the Power Company of certain transmission lines."

The Supreme Court pointed out, in the *Ashwander* case, that the *sale* of surplus energy generated on a public project to a privately owned power company was not a sale for "private or personal ends". In the *Ashwander* case, the power houses were on Government lands and the power was actually generated by Government authority. If (as held by the Court) it could dispose of this energy, in the manner suggested, without infringing the principle of disposing of *public* property for *public* benefits only, why should Section 6 of the Raker Act be held to require a *contrary* construction, considering that a reasonable interpretation of its language does not so require?

Continuing in the *Ashwander* case, the Supreme Court further said (p. 340):

> "* * * And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States. * * * the constitutional right of the Government to acquire or operate local or urban distribution systems is not involved. We express no opinion as to the validity of such an effort, * * *"

In other words, the only authority of the United States, which was upheld in the *Ashwander* case, was the authority to dispose *wholesale* of *its own* energy generated on *its own* lands. The Court, expressly, refused to go

further and say that the Government had a constitutional right to enter into the *local* distribution of electric energy. If the Government has no right, *itself,* to enter into *local* distribution, how can the *Ashwander* case be authority for the regulation of a municipality's right in the matter of its own local distribution?

Another case relied upon by the Government (Appellee's Brief p. 76) is *Camfield v. United States,* 167 U. S. 518. That case, as pointed out at page 114 of our opening brief, approved a decree requiring the removal and abatement of a fence *which enclosed public lands, although erected on adjacently owned private lands.* The only ruling was that Congress had a general authority over United States property analogous to the police power of the state, but was limited to the *physical protection* of the public lands. The contract at bar does not touch the public lands. With the exception of 3 per cent of the total amount of energy (generated at the Early Intake Power Plant), it does not involve electric energy generated *on public lands.* To hold that the Government may follow the energy generated by the City all the way to Newark and there dictate the manner of its disposal, would be equivalent to saying that it could regulate the use of water which originated on public lands but which flowed from them through private lands and into the sea. This intent, as we pointed out, is expressly disclaimed in Section 11 of the Raker Act. In the *Camfield* case, also, the Court expressly stated that the proprietor could enclose his own land, and that the Government had no right to prevent him from doing so since "he is entitled to the

complete and exclusive enjoyment of it, regardless of any detriment to his neighbor''. It was only because the fences erected were deliberately constructed with the idea of enclosing and shutting off the Government's lands, and not for any necessary protection of private lands, that they were held to be illegal.

United States v. Trinidad Coal Company, 137 U. S. 160 (cited at p. 76 of Appellee's Brief) was a suit to void patents to coal lands which had been fraudulently obtained by the defendant through the expedient of having its employees take up the maximum single entries and convey them to defendant. By this process, the defendant had obtained land in excess of that which could be lawfully acquired by one holder. Thus, the defendant's fraud related directly to the disposal of the land, itself, for which reason the case has no bearing on the issues at bar.

The case of *McKelvey v. United States,* 260 U. S. 353 (Appellee's Brief p. 77), involved an indictment against cattlemen for driving sheep men off public lands. The question was whether a statute of Congress punishing trespasses upon the public lands was unconstitutional. The Court said (p. 359):

> ''It is firmly settled that Congress may prescribe rules *respecting the use of the public lands.* It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned.''

There is no suggestion in the *McKelvey* case that the principle which it enunciated may be extended to the im-

position of *conditions upon the disposal of the sheep which grazed upon the public lands,* much less to the imposition of restrictions upon the disposition of *products generated,* far away from public lands, with the use of water stored on and transmitted over or through public lands.

In *United States v. Alford,* 274 U. S. 264 (cited at p. 77 of Appellee's Brief) an indictment was upheld against a person for building a forest fire which spread over a forest reservation. The Supreme Court held that the right to protect the public domain from fire depended upon the *nearness* of the fire, not on the *title* to the land where it was built. Here, again, the physical protection of *public* lands was involved, and not a theory for the public distribution of the indirect by-products of a partial use of public lands.

In *Stephenson v. Binford,* 287 U. S. 251 (Appellee's Brief pp. 72, 79), to which we have already referred (supra, p. 37), provisions of a Texas statute requiring private contract truck haulers to obtain permits to use the state highways and authorizing the Railroad Commission to prescribe the minimum rates which they might charge, were upheld as reasonable regulations for controlling highway traffic, and thus aiding the physical protection of the highways. This case might be in point, in the present case, if the City were here seeking to appropriate Government lands without Government authority, but no such issue is involved in the present case. Moreover, the regulation of highway traffic, which was

the matter involved in the Texas case, was strictly within the police power of Texas, whose statute was involved. The regulation of the strictly municipal affairs of San Francisco is wholly without the power of Congress, whose statute (i. e., the Raker Act) is involved in the present case.

CONCLUSION.

In conclusion, we submit, after a careful reading of the Government's brief, that neither the points made nor the authorities cited therein refute (or even make serious answer to) the contentions made in our Opening Brief. We, therefore, confidently submit, in line with what we have argued herein, and in our Opening Brief, that:

First. The contract in question is a valid *agency* contract, made in good faith by the City and the Company, to provide for the disposal of the electric energy, *which is required by the Raker Act to be generated and sold;*

Second. The manner in which the City is disposing of the electric energy is one permitted by the Raker Act and by the laws of the State of California, and was one which the City was forced to adopt because some period of time must, necessarily, elapse before the City would be financially able to acquire and operate its own distribution system;

Third. If any clause of the contract is not consistent with the declared intention and studied purpose of the parties to make it an *agency* contract, a court of equity

should have indicated the changes which, in its opinion, would make the contract a valid agency contract conformable to Section 6 of the Raker Act, instead of vitiating the entire contract, and inflicting upon the City the dire consequences which the decree herein engenders;

Fourth. If the actual conduct of the parties to the contract is not justified by its terms, or is not consistent with the agency purpose which underlies the contract, the City should be given an opportunity to reform its conduct under the contract so as to make it consistent with the agency principles to which it was designed to give effect;

Fifth. The Court should not impute to Congress a purpose, or give to Section 6 a meaning inconsistent with constitutional limitations upon the powers of Congress, at variance with the standing policy of the Federal Government, in the disposal of its lands adaptable to power generation; nor should the Court impute to Congress an intent which would do violence to the declaration of Congress in Section 11 of the Act itself; and

Sixth. Consistent with equitable principles and particularly those which deal with injunctive law, a decree ought not to be upheld which wreaks great damage upon the defendant, without working any corresponding or, in fact, any benefit whatsoever to the plaintiff.

If the facts and the law of this case be examined in the light of the principles which we have just enumerated, we believe that the Court will find many reasons and more than sufficient justification for reversing the decree of the Court below.

Dated, San Francisco,
April 7, 1939.

Respectfully submitted,

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No. 9055

United States Circuit Court of Appeals

For the Ninth Circuit

3

City and County of San Francisco, appellant

v.

United States of America, appellee

OPENING BRIEF FOR APPELLANT FOLLOWING ARGUMENT ON MAY 19, 1939.

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No. 9055

United States Circuit Court of Appeals
For the Ninth Circuit

City and County of San Francisco, appellant

v.

United States of America, appellee

OPENING BRIEF FOR APPELLANT FOLLOWING ARGUMENT ON MAY 19, 1939.

During the Argument on May 19, 1939, information was asked and inquiries put from the Bench which prompted Counsel for Appellant to suggest that it might be helpful if briefs were filed to deal therewith. Accordingly, the Court allowed time, the appellant to open and close, and the appellee to reply to the opening brief of appellant.

This is the Opening Brief of Appellant.

We intend to deal only with The Statute and The Contract.

I. THE STATUTE.

INTRODUCTION.

The Raker Act was approved December 19, 1913 (38 Stat. 242).

The provision involved reads as follows:

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a mu-

nicipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee.''

This prohibition was dictated (perhaps without revision), by President Theodore Roosevelt in 1906 in respect of an earlier statute, as we later narrate, and involves (so we think) an ellipsis (familiar to grammarians and rhetoricians) defined as follows: ''Omission of word or words, usually such as will be inevitably supplied by the mind, or understood, in the construction of a sentence'' (Wyld's Universal English Dictionary, 1936); ''Omission of word or words easily understood but necessary to the grammatical construction'' (Macmillan's Modern Dictionary, 1938); ''The omission of a word or words necessary to the complete construction of a sentence but not required for the understanding of it'' (Standard Dictionary, 1908); ''Omission from a construction of one or more words, which are obviously understood, but which must be supplied to make the expression grammatically complete, etc.'' (Webster's International Dictionary, 1919). ''The omission of one or more words in a sentence, which would be needed to complete the grammatical construction or fully to express the sense'' (The Oxford Dictionary (1897)).

In re Lippincott's Estate, 276 Pa. 283, 120 Atl. 136 (1923), says (p. 137, c. 2 foot):

''An elliptical form of expression is quite common in writing and speaking alike, and perhaps in wills and contracts most of all. It is not necessary to repeat things that have just been expressed; they are understood to be in the mind of the speaker or writer, and the listener or reader likewise understands them, without repetition. In Goold Brown's Grammar of English Grammars it is said, at page 815:

"'Ellipsis is the omission of some word or words, which are necessary to complete the construction, but not necessary to convey the meaning. Such words are said, in technical phrase, to be understood; because they are received as belonging to the sentence, though they are not uttered. Of compound sentences, a vast number are more or less elliptical; and sometimes, for brevity's sake, even the most essential parts of a simple sentence are suppressed. There may be an omission of * * * even a whole clause, when this respects what precedes.'"

In wills (and the same is true in respect of other writings), words may be interpolated or transposed. *Estate of Goetz,* 13 Cal. App. 292, 295 (1910); *In re Stratton,* 112 Cal. 513, 518 (1896).

In some instances, an ellipsis consists in the omission later of what had been expressed before; but the same rule of construction is applicable of course where the omission of words is at the beginning but clearly indicated by what follows, as in this case.

The Ellipsis: Omissions Supplied.

We submit that the meaning of Section 6 is made the clearer by the introduction of the supplied words underlined and bracketed in the text below, thus making the section read as follows:

"Sec. 6. That the grantee is prohibited from ever selling or letting [any water or electric energy] to any corporation or individual, except a municipality or a municipal water district or irrigation district, [with] the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

We wish to rivet attention on the word "given" because it was contained in the first draft of the prohibition, was not there associated with the words "sold or" but stood alone. The words "sold or given" appeared for the first time in the second draft. All this is shown infra.

We submit the word "given" in the first draft clearly referred to the words "selling or letting", and meant as indicated by the supplied words which follow: "the water given [i. e., by way of sale or lease, as aforesaid] to it or him by the city"; and that it referred to nothing else than the act of "selling or letting" which was the correlative of the word "given".

The word "give" has many meanings, but when it is read in the environment in which we find it here, it deals with transfer of title through "selling or letting".[1]

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[1] "The word 'grant' is synonymous with 'give'. (Webster's Dictionary)". *Gurnsey v. Northern California Etc. Co.*, 7 Cal. App. 534, 544 foot (1908). "Ordinary and accepted meanings of 'give' and 'receive' are synonymous with those of 'grant' and 'accept'." *Standard Oil Co. of Indiana v. United States* (C. C. A. 7, 1908), 164 F. 376, 390 foot; *United States v. Bunch* (D. Ct. Ark. 1908) 165 F. 736, 739 foot. "The word 'given' as used in statute modifying the rule in Shelley's case [such as Section 779, C. C. Cal.] means conveyed." (Carter v. Reserve Gas Co., 84 W. Va. 741, 100 S. E. 738, syl. (1919).)

"The word 'give' is as expressive of a transfer of title as the word 'sell' " (In re Soulard's Estate, 141 Mo. 642, 43 S. W. 617, 622, c. 2, ls. 49-51 (1897)), and while in proper context, it would mean a transfer of title without consideration, it does not exclude a transfer of title upon consideration. Latimer v. Bruce, 151 Ga. 305, 106 S. E. 263 (1921) held that an answer alleged "a contract upon a valid consideration" although the promise alleged was that "he would give her the property". The opinion says that "the word 'give' as employed in the answer, when considered in connection with the context, does not denote a technical gift" (p. 263, c. 2 middle). In times past words of conveyancing were "to give, grant and confirm" land to A. If the consideration was money, the deed operated as a bargain and sale, and if not for money, it was good as a covenant to stand seised. Harrison v.

The addition of the words "sold or" in the second draft of the prohibition did not alter the meaning of "given" as it stood in the first draft; and that word refers to both "selling" and "letting", but inasmuch as sale is specifically mentioned, the effective function of the word "given" thenceforth has been to connect with "letting". Of course, when the word "given" stood alone it had as correlatives both "selling" and "letting", but the draftsman for Congress, with a passion for repetition or to make assurance doubly sure, added the words "sold or", thus giving us "sold or given". If the word "given" in this connection had no historical background and its meaning were doubtful, interpretation would attribute to it a definition akin or having relation to the word "sold", say, as involving, transfer of title. The maxim of *Noscitur A Sociis* (46 Corpus Juris 496) would apply ("The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it")—a maxim akin to *Ejusdem Generis* (19 Corpus Juris 1255).

When these drafts were drawn, it is to be presumed that the idea of a municipality making a gift of water or electric energy to a corporation or individual was not thought of, and that therefore, as a matter of actual intent, that possibility was not present in the minds of

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Austin, 3 Mod. 237, 87 Reprint 154 (1793); Cheney's Lessee v. Watkins, 1 Harris & Johnson 527, 2 Am. Dec. 530 (1804); Young v. Ringo, 17 Ky. (1 T. B. Mon.) 30 (1824); Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406 (1871). In Carter v. Alexander, 71 Mo. 585 (1880) it was held that the word "give" in a contract so far as it was related to land should be taken in the sense of "convey".

Evenson v. Webster, 3 So. Dak. 382, 53 N. W. 747 (1892) held that the instrument under review was a grant, although the word used was "give".

those who drafted or adopted the prohibition. Indeed, if it had been in mind the idea would have been instantly dismissed on the theory that there are common law and statutory prohibitions against the gift of public property by municipalities.

This is quite apart from what might happen if the Municipality should undertake to make a gift of the water or electric energy to a corporation or individual.

It is quite conceivable that an additional argument would then be made that as Section 6 forbade a transfer of title upon consideration, if conjoined with a right of resale, etc., then a similar prohibition should be spelled out of the words "selling or letting", to prohibit a gift with right of sale, etc., in the donee. It is in line with this idea that it was said in Outline of Oral Argument, p. 7: "Section 6 of the Raker Act prohibits (a) sale for resale; (b) gift for sale; and (c) leasing ('letting') for subleasing (to 'sublet')".

There is no merit in the argument of the Government (Br. p. 64 foot) that Congress was not using "selling or letting" to indicate a transfer of title, i. e., for all time (in the case of a sale) and for a specified period (in the case of letting).

The whole idea was that title of the Municipality to the water or electric energy should not pass to another coupled with the right of that other to resell or sublet.

The foregoing is a sufficient reply to what the Government Brief, p. 65, says about the words "sold or given". It is clear that "given" has many significations, but with the environment in which we here find the word it is clear

that its correlative in the first draft and in all following drafts, was "selling or letting" and that the fundamental idea underlying the word "given" was a transfer of title to water or electric energy.

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." (Towne v. Eisner, 245 U.S. 418, 425 (1918).)

Two views have been expressed as to the interpretation of Section 6.

To bring out the first view we must start with the assumption that San Francisco is the vendor of the commodity (water or electric energy) and that a corporation or an individual is the vendee. The vendor is not forbidden to sell the commodity (abstractly) but it is forbidden (in the event it sells) to sell with it the right of the buyer itself or himself to sell. In other words, the vendor is forbidden to put through any form of sale which carries with it the right unto the buyer itself or himself to sell; i. e. the vendor must make a qualified and restricted sale, not an outright and unqualified one.

The prohibition is akin to a covenant against assignment or subletting in a lease; and akin to a deed, with building and other restrictions qualifying and restricting the general words of a grant and the enjoyment thereof.

The second view of interpretation of Section 6 is based (so it seems to us) on an unduly rigid adherence to the letter of Section 6 and is to the effect that Section 6 has nothing to do with a sale of a commodity by vendor to

vendee but is limited to a sale of "the right to sell", something akin to or in the nature of, if not in fact and law, a franchise to sell.

Article XIV, Section 1 of the California Constitution of 1879 provides:

> "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied etc. [here provision is made for the annual fixing of rates by the governing legislative bodies of municipalities, a power since then transferred to the Railroad Commission]. . . . Any person, company, or corporation collecting water rates in any city and county, or city, or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city, or town, where the same are collected, for the public use."

See the law relating to franchises to furnish water in "Waters", 26 Cal. Jur. 476, and relating to franchises to furnish electricity in "Electricity", 10 Cal. Jur. 176. See, also, *Los Angeles v. Los Angeles City Water Co.,* 124 Cal. 368 (1899).

The second theory of interpretation of Section 6, if adopted, would lead to problems not yet worked out and to unique situations.

In the period 1918-1923, the Municipality sold electric energy from the Early Intake plant to the Sierra and San Francisco Power Company, all within Tuolumne County (Br. a.c. 12-20). If Section 6 did not prohibit sale for resale, then the Company became possessed of an unqualified title to the energy sold, and lawfully distributed it

without any franchise or license from San Francisco; indeed, San Francisco did not have any authority to sell, grant or otherwise confer a franchise on the Sierra and San Francisco Company for operation in Tuolumne County.

Inasmuch as the Municipality might sell Hetch Hetchy water or electric energy at points along its lines which cross Tuolumne, Mariposa, Stanislaus, San Joaquin and Alameda Counties, the buyers in such instances would not need any franchise of "right to sell" emanating from San Francisco and unless the sale of the water or electric energy was restricted so as to forbid the buyer to resell, Section 6 would have no operative effect.

Again, when the Raker Act was passed in 1913 the Spring Valley Water Company had a constitutional franchise to distribute water in San Francisco (*Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318 (1915)) which was in perpetuity and could neither be revoked nor impaired by any legislation, constitutional or statutory (*Russell v. Sebastian*, 233 U. S. 195 (1914)); and the Pacific Gas and Electric Company had the constitutional franchise, provided in Article XI, Section 19 of the constitution of 1879 hereinbelow quoted to distribute electric energy in San Francisco. The Spring Valley Water Company was incorporated prior to the Constitution of 1879, but it acquired a constitutional franchise between 1879 and 1911. Pacific Gas and Electric Company was incorporated in 1905 and acquired the above constitutional franchise from its predecessors in interest (*South Pasadena v. Pasadena Land etc. Co.*, 152 Cal. 579 (1908)), and itself acquired the constitutional franchise between 1905 and 1911 (*Matter of Keppel-*

mann, 166 Cal. 770 (1914) involving an employee of that company).

The history of these companies, although not a part of the record, is found in innumerable decisions of courts of California, federal and state. Of all of this, the Court will take appropriate notice.

> "We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." (Mr. Justice Field in Ho Ah Kow v. Nunan (1879), Fed. Cas. No. 6546, 12 Fed. Cases 252).

The provision which gave rise to these constitutional franchises is Article XI, Section 19 of the California Constitution of 1879, amended fundamentally in 1911. Both texts follow.

In force from 1879 to 1911, Art. XI, s. 19, Constitution:

> "§19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

In force since 1911, Art. XI, s. 19, Constitution:

> "§19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance. [Amendment adopted October 10, 1911.]"

If the second view of the interpretation of Section 6 is the correct one then it was possible for the Municipality (until it acquired the properties of the Spring Valley Water Company) to sell all of the Hetch Hetchy water to the Spring Valley Water Company, which the Company could distribute under its constitutional franchise and not be in need of any franchise from the Municipality. So likewise in respect of the electric energy which could be sold to the Pacific Gas and Electric Company for the purposes specified in the constitution.

In these circumstances Section 6 would have no effect whatever.

The foregoing considerations do not take into account that Congress could not (so we submit) (a) in the exercise of its lawmaking power regulate or control the grant of franchises by a municipality acting as the agent of the state, nor (b) enter into a contract with the Municipality

whereby the latter would bind itself in respect of governmental action, authority for which had been delegated to it by the state.

The Government brought this action and the case was tried on the theory that Section 6 forbade sale for resale and that the contract of July 1, 1925 was a contract of sale for resale. (See Complaint pars. VIII and XVIII pp. 6, 9) The court below so decided.

If the second view of interpretation is found to be sound, the judgment should be reversed inasmuch as neither in pleading nor proof did the Government bring forward this view.

The burden of combating the second view is therefore upon the Government.

However, as we believe the true interpretation of Section 6 is that it forbids sale for resale and nothing more (as applied to the facts of this case), we give below the reasons which we have to support that view.

We also deal with other phases of The Statute, and later, briefly consider The Contract.

(a) The Government and the Municipality are agreed that Section 6 prohibits sale for resale. (We reserve for later consideration the argument for the Government that Section 6 prohibits more and the claim of the Municipality that it prohibits nothing more.)

Stripped of all words unnecessary to present purposes, Section 6 reads as follows:

> "Sec. 6. That the grantee [San Francisco] is prohibited from ever selling . . . to any corporation or individual

> . . . the right to sell . . . the water or the electric energy sold . . . to it or him by the said grantee [San Francisco]".[1a]

In considering the language just quoted, the first fact which should be permitted to fasten itself in the mind is (so we submit) that Section 6 is treating of (or has in contemplation) (or is making provision in respect of) a sale (of either water or electric energy) by the grantee (here the City and County of San Francisco) to a corporation or an individual. This fact is fully manifested (so we think) by the words "the water or the electric energy sold . . . to it [the corporation] or him [the individual] by the said grantee".

We submit that Section 6 is to be read as a provision treating of a sale of water or electric energy by the grantee, i. e., the Municipality, to a corporation or an individual.

Section 6 does not prohibit the Municipality from selling water or electric energy to a corporation or an individual but it does put a restriction on such sales by

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[1a]Section 6 in drafts of earlier bills which eventuated in the Raker Act provided "that the City and County of San Francisco is prohibited" but as rights were given in the bills to nearby municipalities, etc. the term "City and County of San Francisco" was changed to "grantee", and the word "grantee" defined in Section 8 as follows:

> "Sec. 8. That the word 'grantee' as used herein shall be understood as meaning the City and County of San Francisco and such other municipalities or water district or water districts as may, with the consent of the City and County of San Francisco or in accordance with the laws of the State of California, hereafter participate in or succeed to the beneficial rights and privileges granted by this Act."

providing that the Municipality shall not sell to the buyer the right (itself or himself) to sell.

The only way in which the vendor of a commodity can withhold from the vendee the right himself in turn to sell the commodity is by imposing a restriction in the transfer (found frequently in commercial life) whereby the sale is upon condition that the commodity is for "buyer's own consumption" or "buyer's own use" or upon kindred condition.[2]

To sum up, the Raker Act confers upon the grantee or recognizes that the grantee has the right to sell; and Section 6 does not attempt to take away that right. It does forbid the Municipality to sell in circumstances which would give the buyer the right himself to sell. The requirements of the law can only be achieved by a sale limited to purposes other than for resale.

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[2] *Wilder Manufacturing Co. v. Corn Products Co.*, 236 U.S. 165 (1915) involved a contract of sale where the vendee "bought the goods exclusively for purchaser's own use."

Fosburgh v. California & Hawaiian Sugar Refining Co., (CCA 9, 1923) 291 Fed. 29 dealt with a contract by a sugar refining company to sell sugar to a candy company wherein it was provided that "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same".

An unlimited sale of a patented article is free from all restrictions and the purchaser is entitled to resell (*Keeler v. Standard Co.*, 157 U.S. 659 (1895); *Free Co. v. Bry-Block Co.* (D. Ct. Tenn. 1913) 204 Fed. 632) but suitable restrictions are very commonly employed to cut off any right to resell.

United States v. General Electric Co., 272 U.S. 476, 489 (1926) holds that the manufacturer of a patented article may seek to dispose of his product directly to the consumer.

Wines and liquors are sold "not to be drunk on the premises where sold" (*John Rapp & Son v. Kiel*, 159 Cal. 702, 704 (1911); see, also, *Sandelin v. Collins*, 1 Cal. 2d 147 (1934); *Bath v. White*, 3 C.P.D. 175 (1877-1878); 18 *Halsbury's Laws of England* 116.

This is all well put in an Opinion of Solicitor Nathan R. Margold of the Department of the Interior, rendered to Secretary Ickes October 27, 1933 (54 I.D. 316)[3] upon the rights and obligations of San Francisco under the Raker Act.

Therein he makes clear that the Municipality has the right to sell water or energy to private companies, provided the latter buy for their own use and not for resale.

Mr. Margold says:

> "The rights and obligations of the city and county of San Francisco in this connection depend upon the Act of December 19, 1913, (38 Stat. 242), commonly known as the Raker Act. Section 1 of the act states that the grant to the city and county of San Francisco is made, among other purposes, 'for the purpose of constructing, operating, and maintaining power and electric plants, poles and lines for generation and sale and distribution of electric energy.' Section 9(l) of the act states that the grantee, after making provision for certain requirements of the Modesto and Turlock Irrigation Districts, and municipalities therein, may 'dispose of any excess electrical energy for commercial purposes.' Section 9(m) further refers to the development of electric power for 'commercial use.' It is therefore reasonably clear that it was contemplated by Congress that under certain circumstances power developed at Hetch Hetchy should be sold to private companies."

After quoting Section 6, Mr. Margold continues:

> "I wish particularly to emphasize the fact that this section prohibits . . . the transfer by the municipality . . . of any right to resell or sublet any electric energy which it may sell to a private company.

[3]Solicitor Margold's Opinion has not been heretofore called to the attention of the Court. In Secretary Ickes' Opinion (R. 243) reference is made thereto, but it is erroneously cited, without title, as appearing in 51 I. D. 316, whereas the citation should have been 54 I. D. 316.

Solicitor Margold's Opinion.

> "Since the city and county of San Francisco may properly sell power so developed to a private company if the company is going to consume it, but since the sale would clearly not be proper if it expressly included any right in the purchaser to resell or sublet the power, it is my opinion that the municipality would violate the act if it were blindly to sell energy to a private company which notoriously uses electric power for resale rather than for consumption. I therefore suggest that Mr. Burkhardt be notified that the city and county of San Francisco may sell electric power developed at the Hetch Hetchy site to a privately-owned electric utility company only if the municipality first receives convincing assurance that all such power will be consumed by the company and will in no instance be resold or redistributed."

The only criticism which can be made of Secretary Margold's Opinion is that it did not go far enough. It should have said, we think, that every transfer by the Municipality of water or electric energy should be limited by a provision that the commodity was for the buyer's own use and not for resale.

The view thus stated by Solicitor Margold represents the interpretation which has been put upon the prohibitions of Section 6 for the past twenty-five years and there has been no departure therefrom by either party to this action in that long period.

Solicitor Margold's Opinion was the third by a Solicitor of the Department of the Interior that the section forbade sale for resale. The first was by Solicitor Edwards, June 8, 1923 (Br. a.c. 18); the second was by Acting Solicitor Wright, July 20, 1925 (Br. a.c. 28), and the third was that of Solicitor Margold himself, October 27, 1933. These three opinions were followed by the Opinion of Secretary Ickes August 24, 1935 (R. 232).

The Municipality has claimed that the prohibition would yield in circumstances of dire necessity, as, for instance, during construction and in circumstances making performance impossible or the like, on the theory that the letter of the prohibition should yield to the spirit of it in the presence of such circumstances, under the views expressed in *Ex parte Lorenzen,* 128 Cal. 431, 438 foot (1900) and *Sorrells v. United States,* 287 U.S. 435, syllabus; 446-448, particularly 447 (1932).

The Municipality, however, recognized the prohibition as one levelled against sale for resale; and this fact is emphasized by its claim to exemption in circumstances of necessity as just stated.

The parties to this litigation therefore have uniformly agreed that Section 6 was a prohibition of sale for resale, and that the section was dealing with a sale of a commodity, i. e., water or electric energy by the Municipality to a corporation or an individual.

On one occasion an argument was made before Secretary Ickes, of which he makes mention in his opinion (R. 241-242) where he says:

Secretary Ickes' Opinion.

"It has been argued that a direct sale of power by San Francisco to the Pacific Gas and Electric Company for the express purpose of resale would not constitute a violation of the prohibitions contained in section 6 for the reason that the company, as a public utility, already has the right to sell power to consumers, and, thus, need not be invested by the

City and County with that right in violation of the statutory prohibitions.[4] This contention confuses the right or authority of the company to sell power in general to consumers with its right to sell them the power generated through the operation of the Hetch Hetchy project. It also confuses the authority of a private corporation, under the terms of its charter and the provisions of laws creating it, to dispense among consumers such electric energy as it is in a position legally to control with the disability of the City and County of San Francisco, under the terms of the Hetch Hetchy grant, to sell or let Hetch Hetchy water or power to such a corporation for purposes of resale to consumers. In each instance, it is the latter, not the former, that is in issue here.''

(b) The genesis of Section 6: Section 6 of the Raker Act was copied from Section 6 of The Owens River Grant to Los Angeles, approved June 30, 1906 (34 Stats. 801), which had been incorporated in the Los Angeles grant at the request of President Theodore Roosevelt and in words dictated by him. The circumstances we submit reenforce the conclusion that the purpose of Section 6 in both acts was to prohibit sale for resale.

The Owens River Grant to Los Angeles preceded The Raker Act by more than seven years.

The grant to Los Angeles was passed in the 59th Congress, 1st Session, and the proceedings in respect thereof appear in 40 Cong. Rec. The references to pages below are to that volume.

The bill which, with amendments, became the approved law was introduced in each House June 12, 1906 (p. 8307, c. 1, middle; p. 8371, c. 1 middle) (S. 6443, H.R. 20151).

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[4]This argument was made May 6, 1935 (R. 233) on behalf of the San Francisco Chamber of Commerce and other kindred civic organizations.

The Senate passed the Senate Bill 6443 June 13, 1906 (pp. 8374-8375) and it reached the House June 14, 1906 (p. 8530, c. 1 foot).

Section 1 thereof as it stood in the House June 25, 1906 contained a grant of "all necessary rights of way . . . for the purpose of constructing, operating, and maintaining canals, ditches, pipes and pipe lines, flumes, tunnels and conduits for conveying water to the city of Los Angeles for domestic purposes only and not for the purpose of irrigation".

The underlined provision was objectionable to Los Angeles because it desired to acquire a volume of water adequate for its domestic purposes in the future and to that end, to employ the water in the interim for the purpose of irrigation, to protect its appropriations.

Los Angeles therefore desired the elimination of the restriction, but Secretary of the Interior Ethan Allen Hitchcock favored its retention.

To settle the differences between Los Angeles and the Secretary of the Interior, the bill being still in the House, a conference was had with President Theodore Roosevelt at The White House, June 25, 1906, at the conclusion whereof he dictated a letter reading, in part, as follows:

> "The White House, Washington, June 25, 1906.[5]
>
> My dear Mr. Secretary:
>
> As I think it best that there should be a record of our attitude in the Los Angeles Water Supply Bill, I am dictating

[5]First Annual Report of the Chief Engineer of the Los Angeles Aqueduct to the Board of Public Works, March 15, 1907 (pp. 26, 27). (Mechanics-Mercantile Library, San Francisco, **628.1, L 87.)

President Theodore Roosevelt's letter June 25, 1906.

this letter to you in your presence, and that of Senator Flint on behalf of the California Delegation, of Director Walcott of the Geological Survey, and of Chief Forester Pinchot. The question is whether the City of Los Angeles should be prohibited from using the water it will obtain under this bill for irrigation purposes. Your feeling is that it should be so prohibited. . . .

Senator Flint states that under the proposed law Los Angeles will be seeking to provide its water supply for the next half century, which will mean that at first there will be a large surplus, and that in order to keep their rights they will have to from the beginning draw the full amount of water (otherwise the water will be diverted to other uses and could not be obtained by the city) . . .

Messrs. Walcott and Pinchot state that there is no objection to permitting Los Angeles to use the water for irrigating purposes so far as there is a surplusage after the City's drinking, washing, fire and other needs have been met. . . .

I am informed by Senator Flint that the law of California provides that if a municipality sells water to people outside the municipality, it must be at same rate that it sells to those within the municipality.

. . . .

Under the circumstances, I decide, in accordance with the recommendations of the Director of the Geological Survey and the Chief of the Forestry Service, that the bill be approved, with the prohibition against the use of the water by municipality for irrigation struck out. I request, however, that there be put in the bill a prohibition against the City of Los Angeles ever selling or letting to any corporation or individual except a municipality, the right for that corporation or the individual itself to sell or sublet the water given to it or him by the City **for irrigation purposes.**

Sincerely yours,

Theodore Roosevelt.

P. S.—Having read the above aloud, I now find that everybody agrees to it,—you Mr. Secretary, as well as Senator Flint, Director Walcott and Mr. Pinchot, and therefore I submit it with a far more satisfied heart than when I started to dictate this letter."

Between June 26, 1906 and June 30, 1906, the following Congressional happenings took place: (a) The House adopted a Substitute Bill which, among other things, struck out the limitation and added Section 6 here below quoted—all in accordance with the foregoing views of President Roosevelt; (b) the Senate passed the Substitute Bill; and (c) the latter became a law upon the approval thereof by the President (June 30, 1906) (40 Cong. Rec. pp. 9342 c. 2, ft.—9343, c. 1 top; p. 9390, c. 1 foot; p. 9496, c. 2; pp. 9665, c. 2—9666, c. 1; p. 9723, c. 2; p. 9801, c. 2 top).

Section 6 of the Los Angeles grant which thus became a law read as follows:

> "Sec. 6. That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city."

For convenience, we give the prohibition as drafted by President Theodore Roosevelt, and as enacted:

President Theodore Roosevelt June 25, 1906	The Owens River Grant Approved June 30, 1906.
. . . that . . . the City of Los Angeles [is prohibited from] ever selling or letting to any corporation or individual except a municipality, the right for that corporation or the individual itself to sell or sublet the water given to it or him by the City for irrigation purposes.	That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city.

The following differences of consequence in the foregoing are to be noted (a) the words "for irrigation pur-

poses'' used by President Roosevelt do not appear in the approved grant; and (b) the text of the approved grant contains the words ''sold or'' which are not contained in the President's letter.

It is to be observed from President Roosevelt's letter that he was thinking in terms of sales or leases by Los Angeles to corporations or individuals for irrigation purposes and that he wished to be assured that such sales or leases would be for the buyers' own use and not for resale or subletting. It is also to be observed that President Roosevelt was thinking of irrigationists who might be living in Inyo, Kern or Los Angeles Counties, outside the city of Los Angeles, through which the granted right of way was to run; and he was not thinking of a franchise from the City of Los Angeles authorizing the sale or subletting of water in those three counties.

When the prohibition was drafted for insertion in the bill (after the conference with the President) it was concluded that there should be a restriction against sale for resale of all water whether for irrigation or otherwise.

The Owens River Grant involved the generation of electric energy but there was no provision in the bill against sale or subletting thereof for resale or subletting. This was undoubtedly due to the circumstances under which the prohibition was formulated. It all turned on the question of the disposition of water for irrigation purposes. This was the concrete problem presented to the President and no account was taken by him of electric energy nor of water except for irrigation purposes.

The prohibitions in Section 6 of the Hetch Hetchy grant, took slightly varied forms from time to time in

the progress of the bills through the two Houses as will later appear. In the meantime it may be useful to contrast the text of the prohibition in the Los Angeles grant with the text of the prohibition in the Hetch Hetchy grant when first introduced and for that reason we put them in parallel columns below.

The Owens River Grant.	Hetch Hetchy Grant.
(Approved June 30, 1906)	(Earliest form, H. R. 112, April 7, 1913)
"Sec. 6. That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city."	"Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any private corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city and county."

It will be noted that the text of each of the foregoing is identical with that of the other except that in the text of 1913 (a) "the city and county of San Francisco" has been substituted for "the city of Los Angeles"; (b) the word "private" has been inserted before "corporation or individual"; and (c) the words "city and county" have been substituted for "city".

We now contrast the text of Section 6 of the Los Angeles grant as enacted (1906) with Section 6 of the San Francisco grant (1913) as enacted.

The Owens River Grant.	The Hetch Hetchy Grant.
(Approved June 30, 1906)	(Approved December 19, 1913)
"Sec. 6. That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a	"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality

municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city."	or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee" etc.

Several differences may be noted between Section 6 of the Raker Act as enacted and the Los Angeles grant. They are these:

(a) The words "The grantee" are substituted for "the city of Los Angeles". (Section 8 of the Raker Act defines "grantee" to include the City and County of San Francisco and other municipalities, etc.)

(b) In the grant of 1906, the words are "except a municipality"; in the grant of 1913, as enacted, the words are "except a municipality or a municipal water district or irrigation district".

(c) The words "for such corporation or individual" in the 1906 text have been deleted from the section as enacted in 1913.

(d) The words "or the electric energy" have been added in the 1913 grant as enacted.

It is clear from the foregoing that the language employed in Section 6 of the Raker Act is that of President Theodore Roosevelt and that in 1906 he was expressing the idea that a sale or lease of water for irrigation purposes by Los Angeles should not carry a right to the buyer to resell or sublet. The President was not considering, so we think ourselves entitled to assume, any legalistic questions. It must be assumed that he was aware, subconsciously perhaps, that a sale or lease of water without re-

strictions would afford the purchaser a right to resell or sublet. This he desired to prevent and he expressed the purpose in language different than would have attended a similar effort by an outstanding legislative draftsman of long professional and technical training. We submit however that the President expressed his purpose and that he made it clear that the prohibition was aimed at unrestricted sales and leases and that his words enjoined that sales and leases should carry limitations denying rights of resale or subletting, if, when and as necessary.

(c) The varied forms of Section 6 of the Raker Act from the first bill introduced April 7, 1913, to the approval of the grant December 19, 1913, will be aids to a sound interpretation, and accordingly, we give them here.

There had been efforts to obtain Congressional concessions from the Government in respect of Hetch Hetchy Valley and other public lands within the period May 16, 1908 and April 25, 1911, but the measures failed of enactment.

The proceedings were in the sessions of Congress below mentioned and in the volumes of the Congressional Record at the pages noted below:

60th Congress, 1st Session, May 16, 1908; 42:6440; 60th C. 2nd S., January 6, 1909, February 1, 1909, February 8, 1909; 43:566, 1662, 2065; 61st C. 1st S., March 19, 1909, March 22, 1909; 44:115, 136, 62nd C. 1st S., April 25, 1911, 47:625.

There was an interregnum of two years until Mr. Raker proposed the legislation which eventuated in The Raker Act.

Five Hetch Hetchy Bills were introduced by Representative Raker of California in the 63rd Congress, 1st Session, and referred to the House Committee on the Public Lands. (The proceedings in respect thereof appear in 50 and 51 Congressional Record.)

The first four were early forms of the grant and the fifth, H.R. 7207, was the bill which with amendments became "The Raker Act," approved December 19, 1913 (38 Stats. 242).

Section 6 appeared in all five Bills and in the Act as it became a law with varied texts as below.

(1) H.R. 112, introduced April 7, 1913:

"Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any private corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city and county, but the rights herein granted to said city and county of San Francisco are for the exclusive use of said city and county and its inhabitants, and for such other municipalities and the inhabitants thereof in the territory surrounding San Francisco Bay, or nearby, in California, as may, with the consent of said city and county, hereafter participate in the enjoyment of the privileges herein granted."

(2) H.R. 4319, introduced April 25, 1913:

"Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any corporation or individual, except a municipality or municipal water district or irrigation district, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the said city and county."

(3) H.R. 6281, introduced June 23, 1913:

Section 6 in this Act is identical with Section 6 in H. R. 4319, except that the word "a" has been inserted in the latter immediately preceding "municipal water district".

(4) H.R. 6914, introduced July 18, 1913:

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be subject to sale, assignment, or transfer to any private person, corporation, or association."

(5) H.R. 7207, introduced August 1, 1913:

Section 6 in this Act is identical with Section 6 in H. R. 6914, except that the words "or the electric energy" are added in H.R. 7207 immediately following the words "the water".

(6) The Raker Act approved December 19, 1913 (38 Stats. 242):

Section 6 of H.R. 7207, which became a law, was amended between introduction and enactment and as enacted read as follows:

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

(d) It is significant that through the Congressional debates upon the Raker Act there was no suggestion that Section 6 meant anything more than a prohibition of sale for resale; that those who spoke to the point all affirmed that to be its purpose and meaning; and that not a word spoken in Congress can be quoted in support of the second view of the meaning of Section 6.

As stated under subdivision (c) supra, Mr. Raker introduced five Hetch Hetchy bills, the last H.R. 7207, on August 1, 1913.

On August 5, 1913, this latter bill was reported favorably by the House Committee on the Public Lands, without amendment, and referred to the Committee of the Whole.

The bill was discussed on various days subsequent to August 5, 1913 and up to September 3, 1913, when it passed the House.

On August 29, 1913, Mr. Raker explained the occasion for his several bills and that he had introduced H.R. 7207 on August 1, 1913, to embody all of the conclusions which had been reached in the House Committee on the Public Lands (50 Cong. Rec. p. 3900, c. 1 foot) up to that day.

Two amendments to Section 6 were agreed to on August 30, 1913, (a) one striking out the proviso at the end of Section 6 and substituting therefor the proviso found in the enacted bill (50 Cong. Rec. p. 3998, c. 2 foot);[6] and (b) one striking out the words "for such corporation or individual" immediately preceding the words "to sell or sublet"[7] (50 Cong. Rec. p. 3999, c. 2 middle).

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[6]The proviso attached to Section 6 in H.R. 6914 and H.R. 7207, supra, read as follows:

> "Provided, That the rights hereby granted shall not be subject to sale, assignment, or transfer to any private person, corporation, or association."

The substitute agreed to on August 30, 1913, which appears in the Act as enacted, reads as follows:

> "Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer or convey, this grant shall revert to the Government of the United States."

[7]The words "for such corporation or individual" thus stricken from Section 6 of the Hetch Hetchy grant appear in President Roosevelt's dictation of June 25, 1906 and in The Owens River Grant enacted June 30, 1906, and in the following Hetch Hetchy

In the course of the debate on the bill generally, Representative Towner of Iowa, Representative Thomson of Illinois, a member of the House Committee on the Public Lands, and Representative Ferris of Oklahoma, Chairman of the House Committee on the Public Lands, spoke respecting Section 6 as below stated, and the meaning ascribed by them to Section 6 was never challenged. There was no discussion in the Senate respecting Section 6. (We speak subject to correction.)

Representative Towner (August 29, 1913):

> "It is proposed in this bill that the city can not sell water or power to any corporation or individual to sell or sublet. But it is not provided that the city may not sell to any corporation it chooses all the water or electric energy it desires for its own use." (50 Cong. Rec. Appendix p. 462, c. 2).

Representative Thomson (August 30, 1913):

> "Under the provisions of section 6 the grantee . . . can not sell water or electric energy to any private corporation or individual for the purpose of resale." (50 Cong. Rec. 3980, c. 1 top).
>
> "Is it not correct that this section, as it reads now, provides substantially that the grantee under this act can not sell to any individual or corporation other than a municipality the right to take any of this water and this power and resell it to somebody else? . . . If this language is read carefully I think it will be seen that . . . these municipalities are prohibited from ever selling or letting to any corporation or individual except a municipality the right to take any of this water and this power and resell it." (50 Cong. Rec. 3996, c. 2 top).

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bills: H.R. 112; 4319; 6281; 6914 and 7207, supra; but were dropped as above stated August 30, 1913. These words were used, so we think, by President Theodore Roosevelt to emphasize the object of the prohibition which he dictated, as one forbidding resale, and presumably were dropped in the last stages of the Hetch Hetchy grant as unnecessary.

Congr. Deb.: Prohibition is sale for resale.

Representative Thomson (September 2, 1913):

"It says that the city can sell their water power to private individuals or corporations for consumption, but not for the purpose of resale." (50 Cong. Rec. p. 4094, c. 2 middle).

"When this bill was being considered by the committee I offered an amendment to Section 6, . . . by adding the words 'or electric energy'. With those words in that section . . . San Francisco may sell this water or electric energy . . . to any other municipality that may come in under the provisions of this bill, or to any private individual in the city for consumption, or to any corporation in the city for consumption, and only for consumption, and under this section it is absolutely impossible for San Francisco to sell a drop of water or a bit of electric energy to any private individual or to any corporation for the purpose of reselling it." (50 Cong. Rec. 4096, c. 2 ft.—4097, c. 1 top).

Representative Ferris (September 2, 1913):

"San Francisco could not sell to any soap manufacturer or ice manufacturer anything that they could resell, but they could sell it to them for their own use." (50 Cong. Rec. p. 4093, c. 1 foot).

"There is an express provision to the effect that they can not resell the power in any way. They can sell for use only with a positive restriction against sale for any resale purposes of any sort." (50 Cong. Rec. p. 4093, c. 2 middle).

The foregoing extracts from the Congressional Record leave no doubt (so we submit) that the purpose of Section 6 was to prohibit sale for resale; but in connection therewith we take the point that the language of Section 6 (once the omissions are supplied as in the case of an ellipsis) is so plain that it does not need reenforcement from Congressional debates. The rule established by the authorities assembled in Br. a.c. 86-87 is that where the meaning is plain resort to Congressional debates is not had.

(e) If we examine Section 6 textually (supplying what we regard as obvious omissions) it will appear, so we submit, that the prohibition contained therein was one against sale for resale.

The considerations which have been already expressed, supra, cover this point (so we think).

Section 6 deals with "the right [of a buyer corporation or a buyer individual] to sell or sublet the water or the electric energy sold or given to it [the corporation buyer] or him [the individual buyer] by the said grantee".

Therefore, there should be no doubt whatever that the provision deals with a right of a buyer consequent upon a purchase of the water or electric energy ("a buyer" connotes "a sale and purchase"). The section is intended to prevent the creation of a right in a buyer through an act of sale, etc.

In other words Section 6 is dealing with a sale by the grantee under the act (San Francisco) and imposes a prohibition against the ordinarily arising right of the purchaser himself to sell.

If this be a correct analysis of the statute, then it is a prohibition against any sale by the Municipality which would pass on to the buyer the right himself to resell.

(f) Section 6 cannot be properly interpreted, so we submit, as a prohibition against the granting of a franchise by the Municipality.

A distributor of water to a community for compensation, when acting as owner and not as agent, requires (a) ownership of water and (b) a franchise to distribute it.

If the owner of water (in this case the Municipality) can only sell that water to a distributor company or individual, for its own use and not for resale, the distributor is denied this source of supply. If on the other hand there are no restrictions upon or prohibitions against the sale of the commodity, then the only question presented would be the question of franchise. If, in that event, the distributor (corporation or individual) possessed a franchise, no difficulty would be encountered in marketing the commodity.

It is fair to assume that Congress would have been alive to the fact, for instance, that the Spring Valley Water Company had a franchise and that therefore the section would be nugatory if it were merely a prohibition against the granting of a franchise. (The Spring Valley Water Company figured on many occasions in the debates which resulted in The Raker Act.)

If as soon as water was available after the approval of the Raker Act and before the purchase of the Spring Valley Water Company's properties, the City sold all of the water to the Spring Valley Water Company and the Spring Valley Water Company distributed it with its own water, would the Government have any cause of action? It could not object, upon the assumption with which we are now dealing, that the City had sold the Hetch Hetchy water to the Spring Valley Water Company and there could be no objection to the Spring Valley Water Company as owner distributing the water to the inhabitants of San Francisco under its own franchise. The Government, in the instance supposed, would be without any remedy.

The interpretation of the prohibition as one merely against the granting of a franchise would seem to be totally inadequate to the purpose of Congress and the comprehensive prohibition would be one of sale for resale. (See extracts from the Congressional debates, (d), pp. 29-30, supra.)

Another instance: Let us assume that San Francisco made in 1914 an agreement to sell all of its water to the Peoples Water Company and, the constitutional grant of 1879 being no longer available, agreed to give it a franchise to distribute the water. Would the Government be entitled to maintain an action to enjoin the Municipality from granting such a franchise? And if the people, by constitutional amendment, granted such a franchise, could the Government protest? If the franchise had been granted could the Government sue to have it revoked?

Take the present situation:

If the contract of July 1, 1925 were treated as a sale, there would be no objection to it as one forbidden by Section 6 under the assumed interpretation. The City does not purport in the contract of July 1, 1925 to confer a franchise on the Pacific Gas and Electric Company. It is acting on the basis that the Company has authority to distribute. Could the general government bring a suit in *quo warranto* to oust it from the distribution of Hetch Hetchy electric energy or could it bring an action to oust it from the streets of the Municipality?

A construction of a statute which gives rise to grave doubts about its constitutionality is to be avoided. (*Labor Board v. Jones & Laughlin,* 301 U.S. 1, 30; *Anniston Mfg. Co. v. Davis,* 301 U.S. 337, 351-352; *Chippewa Indians v. United States,* 301 U.S. 358, 376 top (1937). We submit that to say Section 6 prohibits the granting of franchises by the Municipality would do more than raise grave doubts about its constitutionality.

If, moreover, the contract of July 1, 1925 is one of agency, then the Company is distributing the power as the agent of the Municipality which needs no franchise itself to distribute.

We submit that a thoughtful consideration of the foregoing will lead to the conclusion that Section 6 does not deal with franchises but merely with sales to be coupled with restrictions whereunder the buyer would not acquire the right itself or himself to sell.

(g) Once it is concluded that Section 6 forbids sale for resale, it follows that there are no other prohibitions therein because the prohibition of sale for resale exhausts the content of the section, both of words and ideas.

Once it is concluded that the purpose of Section 6 was to prevent sales for resale, it will be clear that nothing remains in the prohibition, either in words or ideas, to extend the interpretation beyond a prohibition of sale for purposes of resale.

This has been fully developed in the briefs, and particular attention was given thereto in Outline of Oral Argument, pages 8-24, to which we invite the attention of the Court.

(h) There is no other condition in the Raker Act (one leading to forfeiture) except that contained in the proviso to Section 6 which declares that "the rights hereby granted shall not be sold . . . and in case of any attempt to [do] so . . . this grant shall revert to the Government of the United States". In connection with this point, we review Section 9, subsection (u), which limits the remedies of the Government to suit, and Section 11, which prescribes that the grant shall be in subordination to the law of waters of the State of California.

We here quote the following provisions of the Act:

"Sec. 6. . . . Provided That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

Sec. 9, sub-sec. (u). . . . "Provided, however, That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act."

Sec. 11. "That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or

> other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State."

As stated, (c), supra, p. 26, five Hetch Hetchy bills were introduced by Representative Raker in 1913.

Section 11 above quoted appears in the fourth and fifth Bills, i. e., H.R. 6914, introduced July 18, 1913, and H.R. 7207, introduced August 1, 1913.

The reverter clause in the proviso to Section 6 did not appear in either of the two Bills last mentioned nor in any earlier bill but was added August 30, 1913, supra, p. 28, footnote 6.

Section 9, subsection (u), never appeared in any of the Bills, but was added September 2, 1913, the day immediately preceding the passage of the Act in the House, which was September 3, 1913 (R. 72 ft., 75 ft.). The proceedings in the House which led to the inclusion of Section 9, subsection (u), are shown in adequate fullness in R. 70-75.

From the foregoing, it follows that in point of enactment, Section 9, subsection (u), was last.

That provision, as will be seen (R. 70-75), was to wipe out all possibilities of forfeiture except, say, the proviso of Section 6.

The word "condition" or "conditions" appears thirteen times in the Act; once in Section 1, eleven times in Section 9, and once in Section 11. Excluding reference to the word in Section 9, subsection (u), and Section 11 above quoted,

the eleven occasions where one or the other of these two words is used are as follows:

(1) Sec. 1. "under such conditions and regulations as may be fixed by the Secretary of the Interior and the Secretary of Agriculture."

(2) Sec. 9. "That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:"

(3) Sec. 9, sub-sec. (a), subd. Fourth. "The cost of the inspection necessary to secure compliance with the sanitary regulations made a part of these conditions, which inspection shall be under the direction of the Secretary of the Interior, shall be defrayed by the said grantee."

(4) Sec. 9, sub-sec. (d). "upon the express condition, however, that the said grantee may require the said irrigation districts to purchase and pay for a minimum quantity of such stored water."

(5) Sec. 9, sub-sec. (1). "no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein."

(6) Sec. 9, sub-sec. (m). "That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years."

(7) Sec. 9, sub-sec. (n). "and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development" etc.

(8) Sec. 9, sub-sec. (p). "That this grant is upon the further condition that the grantee shall construct on the north side of the Hetch Hetchy Reservoir site a scenic

road or trail, as the Secretary of the Interior may determine."

(9) Sec. 9, sub-sec. (q). ". . . it shall reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed."

(10) Sec. 9, sub-sec. (r). "That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make investigations . . . which . . . involve expense . . . then such expense shall be borne by said grantee."

(11) Sec. 9, sub-sec. (s): "That the grantee shall file . . . its acceptance of the terms and conditions of this grant".

We may therefore dismiss any question about what conditions the Government might have imposed in making the grant. The Act contains but a single instance of a condition, using the word in its technical sense, and the only remedy for any violation of the grant by the Municipality except in the one instance mentioned is by suit of the Government.

In connection with Section 11 above quoted which declares that the Raker Act is in subordination to the water laws of the State of California, we invite attention to the fact that neither in The Owens River Grant to Los Angeles, nor in The Raker Act, did Congress assume to have control over or interest in the water.

The title of The Owens River Grant is this: "An Act authorizing and directing the Secretary of the Interior to sell to the city of Los Angeles, California, certain public lands in California; and granting rights in, over, and

through the Sierra Forest Reserve, the Santa Barbara Forest Reserve, and the San Gabriel Timber Land Reserve, California, to the city of Los Angeles, California''.

The title of The Raker Act is this: ''An Act granting to the City and County of San Francisco certain rights of way in, over and through certain public lands, the Yosemite National Park and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest and the public lands in the State of California, and for other purposes''.

It was suggested from the Bench during the argument that the real property of the Government might appropriately be considered as participating in the creation of the energy and that hence it was not therefore entirely accurate to say that the Government only furnished the facilities by which the Municipality itself captured its own water and created its own energy.

It is possible that the argument by the Municipality on this point is not of substantial importance, but inasmuch as Congress itself recognized that the Government had no participation in the capture of the water owned by the City, nor in the generation of the electric energy created by the City by the use of its own water these facts should be taken for granted. In these circumstances we submit that the contention of the City that the Government cannot be fairly said to have done more than afforded facilities is a meritorious one.

(i) Having fully discussed the interpretation of Section 6, it will be helpful to show from the Congressional debates that the consensus of opinion in Congress in passing the Raker Act was that the imposition of "conditions" in the Hetch Hetchy grant was an exercise of power by a proprietor and not an emanation from the law-making authority; that the Government had no interest in the water; that Congress did not intend to grant it, and that the source of title to the water was the State of California.

The question whether the prohibitions of Section 6 of the Raker Act are statutory or contractual, or both, has been muchly considered in the briefs (see Outline of Oral Argument, p. 22), and it is of interest that the views of the members of Congress support the claim that as matter of construction it should be held that these prohibitions are imposed by a proprietor and do not emanate from the lawmaking power.

The debates also throw light on another matter.

Although Congress did not attempt any grant of waters and studiously abstained therefrom, yet the source of title to the waters is of importance and interest. It will be appropriate therefore to show from the debates that there was unanimity of view that the source of title to the waters was the state and not the general government.

We now give extracts from the debates respecting both these matters.

Representative Raker, August 29, 1913:

> "The theory on which this bill is drawn is that the United States, having sole jurisdiction over the national park, has the right to refuse the grant and also has the right in making the grant to impose certain conditions upon the grantee. The bill is not drafted nor designed nor intended to usurp

the powers of the State of California in the matter of control of the distribution of water." (50 Cong. Rec. p. 3900, c. 1 middle).

Secretary Lane, August 29, 1913 (testimony given by him at an earlier hearing but laid before the House on the day just stated):

"The general principle of the bill is that these lands belong to the Federal Government and that we have control of them. The water originates in them, the water flows through them, and we have control over the dam site, and if we are to allow these lands to be submerged we have got the right to make certain conditions. Certainly no one can come in and use lands in a national park without our consent, and if you give consent you have got the right to make conditions." (50 Cong. Rec. p. 3907, c. 1 middle).

Representative French of Idaho, August 30, 1913:

"As has been stated in the report of the Committee on the Public Lands, the theory on which this bill is drawn is that the United States, having the sole jurisdiction over the Yosemite National Park, the Stanislaus National Forest, and the public lands that would be involved in the grant, has the right to refuse the grant and also has the right in making the grant to impose certain conditions upon the grantees." (50 Cong. Rec. p. 3967, c. 1 middle).

Representative Thomson of Illinois, August 30, 1913:

"This is not so much a legislative act or grant as it is a contract between the Government and San Francisco and these other cities, in which we, representing the Government, not only may but should place proper and reasonable conditions. That Congress has the right to impose such conditions there can be no question". (50 Cong. Rec. p. 3979, c. 1 foot.)

Congressional Debates: Source of Title to Water: Conditions are those of a Proprietor.

Representative Ferris of Oklahoma, September 2, 1913:

"We, of course, must not invade the State laws where parties have prescribed water rights." (50 Cong. Rec. p. 4096, c. 1 foot).

Representative Mann of Illinois, September 2, 1913:

"It is a principle of law that Congress in granting a right can grant it on conditions and provide for its ending as it pleases, regardless of courts." (50 Cong. Rec. p. 4104, c. 2 middle.)

Representative Mondell of Wyoming, September 2, 1913:

"I do not claim that the Federal Government may not fix conditions on a grant of a right of way. . . . It might make a condition as to a grant of right of way over which water is to be carried that the city shall not charge over a certain amount for the water furnished to its citizens. That is a condition that I should not consider necessary or proper, but it does not impair a constitutional right. What I claim is that Congress has no power to shorten the sovereignty of a State. . . . In the bill are a lot of provisions they think may be enforced, contrary to that rule, through the medium of a contract. I do not think it is good legislation." (50 Cong. Rec. p. 4111, c. 1, middle.)

Senator Borah of Idaho, October 4, 1913:

"The Government is not undertaking to regulate and control the waters of the State of California, but it is simply attaching a condition to a specific grant which it is making to the city of San Francisco, as a proprietor and not as a sovereign." (50 Cong. Rec. p. 5472, c. 2 ft.)

Senator Pittman of Nevada, October 7, 1913:

". . . this bill does not grant any water rights to anyone; it does not take away any water rights from anyone;" (50 Cong. Rec. 5494, c. 1 ft.)

Congressional Debates: Source of Title to Water: Conditions are those of a Proprietor.

Senator Smoot of Utah, December 1, 1913:

". . . the only way in which San Francisco can have her needs supplied is under the laws of California. San Francisco can make appropriations of the water, and I understand she has already done so. If she has made these appropriations, all that prevents her from going on with the project is that she must have an act of Congress authorizing her to construct a pipe line over the public domain and build a reservoir. . . . That will give her all the rights Congress can give her. It will give her a right of way to enable her to use every drop of water to which she is entitled. She is not entitled to a gallon of water she has not appropriated under the laws of California, no matter how many bills we pass in Congress purporting to grant her more." (51 Cong. Rec. p. 13, c. 1 middle).

Senator Thomas of Colorado, December 3, 1913:

". . . the city of San Francisco is not attempting, and could not if it would attempt, to secure a grant from the Government of the United States of any water power whatever." (51 Cong. Rec. p. 132, c. 1 ft.)

Senator Lippitt of Rhode Island, December 3, 1913:

"As I understand the way the act is drawn, the United States gives a right of way to the city of San Francisco and that is substantially all it gives. And the dam site." (51 Cong. Rec. p. 135, c. 2 middle.)

Senator Smoot of Utah, December 3, 1913:

"The Government of the United States does not own any water." (51 Cong. Rec. p. 136, c. 1 middle).

Senator Brandegee of Connecticut, December 4, 1913:

". . . if the Government is the proprietor of land I have no doubt whatever of the power of the Government to sell its land or to grant any less estate than a fee simple under

whatever conditions it may attach, which are, in my opinion, the same as those which any other proprietor of land may attach." (51 Cong. Rec. p. 183, c. 1 top.)

Senator Borah of Idaho, December 5, 1913:

"I have no doubt of the power of the National Government to attach such conditions to this grant as any other proprietor may attach to a grant of land, and I have no doubt of the proposition that the Government can attach no other conditions that an individual proprietor of land could attach to a grant of land; in other words, the National Government cannot, in making a grant of this kind, combine its proprietary rights with its sovereign power and do things as a proprietor because it is a Government that it could not do as a proprietor if it were not a Government." (51 Cong. Rec. p. 286, c. 2 middle.)

(j) It is to be remembered that although the Government had full power to attach conditions to the grant, nevertheless we are concerned only with the conditions which it did impose and are not to concern ourselves with conditions which it might have imposed.

As already shown, the only condition which the Government imposed in the Hetch Hetchy grant is contained in the proviso to Section 6, which provides that "the rights hereby granted [lands and interests in lands] shall not be sold" etc. otherwise a reverter ensues. Therefore the relations between the parties in all other particulars arise out of covenants and are contractual unless they also emanate from the lawmaking power, in which event they are statutory as well.

(k) Conclusion of considerations arising out of The Statute.

We therefore conclude our discussion of The Statute, and pass to the consideration of The Contract.

II. THE CONTRACT.

The Contract has been adequately dealt with in the briefs but we add a short consideration of some features which may be profitably noted, and also give consideration to questions suggested at the argument.

(a) It was asked at the argument whether there was an intermingled supply of electricity involved in *Los Angeles Gas & Electric Corporation v. Los Angeles,* 188 Cal. 307 (1922). There was. See pp. 311 middle, 313 foot, 318 foot and 320 middle.

While mention of this fact is made in the opinion, the case is not made to rest upon that circumstance and the case is not authority that there cannot be an agency if there be intermingled supplies of electricity.

The opinion says, "the contract is one for the distribution of 62,500 horse-power of electrical energy to customers mostly within the City of Los Angeles, 25,000 of it to be supplied by the companies and 37,500 by the city. The contract specifically provides that the city is to purchase the 25,000 horse-power from the electrical and power companies and that the power lines of the companies are to be used for the distribution of the electrical energy of the city." (p. 311.)

The case was cited, Br. a.c. 17, to the point that the parties to the contract of July 1, 1925 had before them a ruling that electricity might be distributed through an agent, and in the light of that decision were seeking to make their contract one of agency. In the Outline of Oral Argument, page 21 foot, language was inadvertently used which did or might be interpreted to say that the *Los*

Angeles case was one of intermingled energy. This was an error.

The aspect of the *Los Angeles* case, which is important here, is well brought out in Brief for Appellant, page 36, to which we invite the attention of the Court.

(b) In Br. a.c. p. 40, attention is called to the fact that in its opinion, the District Court practically took no notice of the importance of intention in the construction of the contract and used the word "intent" or "intended" in its opinion on three occasions only, there specified.

There is a like disregard of "intention" in the Government's brief. The only places therein where the importance of the intent of the parties is recognized are these:

(1) Page 23: "The real nature of the contract is determined by the intent of the parties as manifested by the substance of the contract and by their acts, and is not controlled by the mere words and forms of the contract".

(2) Pages 29-30: "The district court recognized and correctly applied the accepted principles of construction of such instruments, including the cardinal rule that the true intent of the parties must govern".

(3) Page 31: "It clearly appears that the parties contemplated a contract to, and did in fact, buy and sell the electric energy".

(4) Page 31: "The brief *amicus curiae* proceeding on the proposition that intention to pass title is important on the question of sale contends in effect that because some

of the terminology used is indicative of agency that that terminology is controlling''.

(5) Page 42: ''It was obviously not intended that final account between the parties should await the ascertainment of the average revenue per unit at the end of the current year''.

(6) Page 45: ''This evidence [that of Mr. Vincent, Vice President and Executive Engineer of the Pacific Gas & Electric Company, called as a witness by the Government] shows that the eighth paragraph was intended to have no more binding and operative effect than was in practice given to it. A fixed price was contemplated.''

The foregoing is the sum total of all discussion in the Government's brief on the subject of the intent of the parties as governing the interpretation of the contract.

We shall speak below of the quotation from page 45 above respecting the eighth paragraph of the contract.

(c) The opening paragraph of the contract is followed immediately by a number of recitals, after which follow the contractual paragraphs of the contract.

The closing paragraph (Fifteenth) reads as follows:

> ''Fifteenth: The recitals hereinabove contained commencing with the words 'Whereas, the City has now completed the construction of the Moccasin Power Plant', and ending with the words 'a great loss of potential revenue to the City and its taxpayers; and' are statements made by the City of its purposes and intentions and concerning other matters contained in said recitals. Said recitals are not and no one of them is

> made by or on behalf of the Company. None of said recitals shall be binding on either of the parties to this agreement in any dispute, controversy or question which may ever hereafter arise in which the same might otherwise be relevant or pertinent."

Speaking of this paragraph, the Government's brief says (p. 9): "The recitals are not binding on either party". (See Br. a.c. 97-98.)

The matter is not important but it is worth an explanation. Evidently the Municipality desired in the contract to set forth its purposes and plans and other related matter, and did so. It would have been inappropriate for the Company to have assumed that it could speak to the purposes and plans of the Municipality and therefore (we must assume) it was provided: "Said recitals are not and no one of them is made by or on behalf of the Company". Evidently, the Municipality thought that if the recitals were not made by or on behalf of the Company, they would not be binding on the Company in the event controversy arose and it protected itself by providing that the recitals should not be binding on either party if any dispute, etc., thereafter arose.

This point therefore is of no importance to the questions at bar.

(d) The contract provides that:

"... 76 per cent of the energy consigned and delivered at Newark should be taken as the true measure of the amount possible of deliverance to consumers" (Par. Third).

". . . that inasmuch as in the year 1924 under existing rates the average revenue received by the Company . . . amounted to 2.383 cents per kilowatt hour, such average revenue should be applied to 76 per cent of the energy" (Par. Fourth).

". . . that the City shall receive . . . 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered at Newark, and that the Company shall receive 73.065 per cent thereof" (Par. Fifth).

This was an attempt by the Municipality and the Company to give the Municipality the revenue properly appertaining to its own energy after deduction of compensation to the distributor, wholly in line with the ruling in *Los Angeles Gas & Electric Corporation v. City of Los Angeles,* 188 Cal. 307, 205 Pac. 125, as set out in Brief for Appellant, pages 36-37.

(e) The payment on or before the fifteenth of each month following the delivery of the power was designed to give ample time for the Company to make its collections. From the nature of things there could not be an invariable coincidence in collections by the Company and payment to the City, but for practical purposes the collections may be assumed to have preceded the payment.

(f) The accounting was in form and in purpose from an agent to a principal as near as the circumstances would allow considering that the Municipality had an inadequate supply which required supplementing in order to serve the purposes of the inhabitants of the Municipality.

(g) At the final hearing the Government, assuming the burden of proof, called a witness to show that there had been official reductions in the rates in 1935, 1936 and 1937 (ten, eleven and twelve years after the making of the contract) which gave an average rate of return below that fixed in the contract by 1, 6 and 11%, and yet the amount paid to the City remained unchanged. This is dealt with in the Government's brief at page 43. It is also treated in Brief for Appellant, pp. 35-39; Brief Amicus Curiae, pp. 54-62; Outline of Oral Argument, pp. 27-28, and little remains to be added thereto.

Inquiry was made at the oral argument as to whether there was any change in the average revenue consequent upon change of wages, etc., and if that were important, upon whom the burden of proof in respect thereof would lie.

We assume that the burden of proof would be upon the Government. Moreover, the fact that the parties made no effort to readjust the figures in the contract would lead one to suppose that changes compensated one another and that the rate was approximately correct. Indeed, Mr. Vincent testified that there was a variation covering twelve years collectively of about one-tenth of one per cent. He said:

> "From August 1, 1925 to the end of December, 1937, estimating the three months of the year still to run, the average revenue of our Company from the sale of electric energy sold in San Francisco was 2.381 cents per kilowatt hour as compared with 2.383 cents per kilowatt hour used as the return base in the contract of July 1, 1925. This is a dif-

ference of less than one-tenth of one per cent.'' (R. 299:2-11; Br. a.c. p. 56.)

(h) As we live in a practical world and as the approximation can be only as exact as circumstances will allow, there is a clear case made that the result reached was as accurate as possible and in full subordination to the requirements of an agency contract.

(i) There is nothing to show that the factors had not been reexamined from time to time by the contracting parties separately or in conference, nor that there would be variation as a result of the conference. Furthermore, if the parties should have conferred and readjusted oftener than they did, that would not invalidate the contract nor turn an agency into a sale.

(j) The Municipality is not called upon to find the word ''agent'' in Section 6. A sale of the energy is prohibited, and if no sale occurred, that is a sufficient answer to the case of the Government. The Municipality is quite within the law because the line drawn by Section 6 is sale or no sale and ''the very meaning of a line in the law is that you intentionally may go as close to it as you can, if you do not pass it'' (*Superior Oil Co. v. Mississippi,* 280 U.S. 390, 395 foot (1930), opinion by Mr. Justice Holmes). See, also, Outline of Oral Argument, pp. 20-22; also Br. a.c. pp. 85-93.

It is respectfully submitted that the decree of the Court below should be reversed, with directions to dismiss the bill.

Dated, San Francisco, June 9, 1939.

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No. 9055

In the United States Circuit Court of Appeals for the Ninth Circuit

City and County of San Francisco, appellant

v.

United States of America, appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

SUPPLEMENTAL BRIEF FOR APPELLEE, UNITED STATES

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9055

City and County of San Francisco, appellant

v.

United States of America, appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

SUPPLEMENTAL BRIEF FOR APPELLEE, UNITED STATES

QUESTION PRESENTED

At the close of the argument of this case, the Court directed that the parties file briefs on the question:

> Whether or not the prohibition against the selling of the right to sell and, of course, letting [contained in section 6 of the Raker Act of December 19, 1913, 38 Stat. 242] which is another way of saying leasing—whether the selling or letting of the right to sell refers to a franchise, which, under the terms of the San Francisco City Charter, could only be given by offering for sale at

public auction and would be technically and strictly a selling or letting of the right to sell.

STATUTES AND CHARTER PROVISIONS INVOLVED

The relevant articles of the California Constitution of 1879, Art. XI, sec. 19, and as amended October 10, 1911, and Art. XIV, secs. 1 and 2; the San Francisco Charter of 1899, Art. II, secs. 1 (2) (14), 5, 6, and 7 (Calif. Stats. 1899, p. 247) are set forth in the Appendix.

ARGUMENT

I

The prohibition of section 6 of the Raker Act includes sale for resale and the granting of agency to sell electric energy generated at Hetch Hetchy

A. The prohibition does not refer to the granting of a franchise by the municipality

It is essential to the character of a right as a franchise that it be a grant of a privilege emanating from, and conferable only by, sovereign power. *Bank of Augusta* v. *Earle,* 13 Pet. 519, 595; *California* v. *Pacific Railroad Co.,* 127 U. S. 1, 40–41; *Bank of California* v. *San Francisco,* 142 Cal. 276, 280, 75 Pac. 832; *The People* v. *Continental Ben. Ass'n,* 280 Ill. 113, 115, 117 N. E. 482 (1917).

The prohibition of section 6 of the Raker Act is against "selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell

or sublet the water or the electric energy sold or given to it or him by the said grantee."

The California Constitution, Art. XIV, sec. 2, provides:

> The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.

1. This section of the California Constitution defines a franchise as the "right to collect rates or compensation for the use of water." Since this is not identical with the phrase in section 6—"right to sell water"—the similarity in phraseology of the two provisions affords no basis for inference that the subject matter of section 6 of the Raker Act was intended by Congress to be the same as that of section 2 of Article XIV of the California Constitution.

2. The context of the phrase in section 6 of the Raker Act clearly shows that it was not used in the sense of "franchise." Congress did not say to San Francisco: "You may not, with reference to Hetch Hetchy water and energy, confer on a private corporation or an individual a franchise to sell within your confines, but you may confer upon municipalities over which you have no control a franchise to sell outside your limits." It was manifest to Congress that San Francisco could not confer franchises to operate beyond its limits and

therefore neither the exception nor the prohibition can be taken as referring to franchises.

Again, the right to sell, granting of which is prohibited by section 6, is not the right to sell all water or energy from whatever source derived, but only the right to sell the Hetch Hetchy water or energy obtained from the City. It is much more reasonable to believe that Congress was restricting the City in dealing in a proprietary capacity with water and energy obtained by the use of the property of the United States rather than that it was attempting to interfere with the City in the exercise of its delegated sovereign power of granting franchises.

3. Furthermore, such an interpretation would prevent the City's disposition of the electric energy except to such private corporations or individuals as already had franchises. It is conceded in the brief of the City (pp. 9–10),[1] that both the Spring Valley Water Company and the Pacific Gas & Electric Company at the time of the passage of the Raker Act were under California Constitution, Art. XI, sec. 19, vested with franchise rights in San Francisco to distribute water (*Lukrawka* v. *Spring Valley Water Co.*, 169 Cal. 318, 146 Pac. 640 (1915); *Russell* v. *Sebastian*, 233 U. S. 195 (1914)) and electric energy (*Matter of Application of Kep-*

[1] Unless otherwise specified, references herein to the brief of the City are to the "Opening Brief after Argument."

pelmann, 166 Cal. 770, 138 Pac. 346 (1914)), respectively. In practical effect, therefore, construction of the prohibition as referring to a franchise would prevent the disposal of the energy to any other private corporation and permit its disposal only to the Pacific Gas & Electric Company which is the very "monopoly" from whose hands Congress sought to keep the benefits of its grant. The language of the Act should be construed so as to effectuate, not to defeat, the evident purpose of the legislation. *St. L. & O'Fallon R. Co.* v. *United States,* 279 U. S. 461, 484; *Royal Ind. Co.* v. *American Bond Co.,* 289 U. S. 165, 169.

4. Again, as pointed out in the City's brief (pp. 33–34), to construe section 6 of the Raker Act as an attempt by the United States to restrict the power delegated by the State to the City to grant franchises (Calif. Const., Art. XI, sec. 19, as amended October 10, 1911, Appendix, *infra,* p. 22) would be to raise grave doubts as to its constitutionality. Such construction, of course, is to be avoided. *Richmond Co.* v. *United States,* 275 U. S. 331, 346; *Reinecke* v. *Trust Co.,* 278 U. S. 339, 348–349.

B. The scope of the prohibition of section 6 of the Raker Act does not exclude sale, lease, or gift of the water or energy

Another construction of section 6 suggested as possible from the bench was that it does not prohibit the grantee from selling any electric energy

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to anybody for any purpose; that it only prohibits the grantee from selling the right to sell under certain circumstances.

It is submitted that, as the City contends (Br. 12), sale for resale is prohibited, and that this suggestion, insofar as it implies that sale for resale ~~under certain circumstances~~ is not prohibited, is no more tenable than that discussed under Point I (A) above.

The debates in Congress (Appellee's Br. 62–63) and the Act itself clearly show an intent on the part of Congress, in pursuit of its purpose to avoid the possibility of private monopoly, that the benefit of the grant by the United States should be enjoyed by private corporations or individuals only to the extent that they might obtain the energy generated at Hetch Hetchy as ultimate consumers. Equally clear is an intent that the additional benefit of the grant, arising out of the right to sell the energy generated at Hetch Hetchy should be enjoyed only by the City and its transferee municipalities and by them alone. Obviously, if this benefit, the privilege of selling the energy, might, by outright sale, agency, or in any other manner, be transferred by the City to any private corporation or individual, the purpose and intent of Congress would be thwarted. Congress sought out the strongest terms it could find to prohibit a transfer by the City grantee to any private corporation or indi-

vidual of an unrestricted ownership of the energy or water. Any sale or transfer by the City to such a corporation or individual must be of such nature that it does not carry with it the right to sell. The use of the broad phrase "right to sell or sublet" in the prohibition, rather than the narrow "sale for resale" was much more appropriate to the attainment of the end in view. Thus, construed according to its literal wording and in accordance with the underlying intent and purpose of Congress, the statute clearly prohibits a sale which permits a resale, in other words, a conveyance of the entire unqualified interest, since necessarily such a conveyance to the Company would vest in it the right to sell or let the energy so conveyed. The statute can be given no real effect except by construing it as a prohibition against the City's transferring by any method to a private corporation or individual its right to sell the electric energy developed through its utilization of the rights and privileges granted by the Raker Act.

Furthermore, interpretation of the prohibition as extending merely to the transfer of the abstract right to sell, is subject to most if not all of the objections to its construction as relating merely to granting of franchises discussed above.

The Government agrees with the City that there is no warrant for construing the words "right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee" as re-

ferring to a franchise right or as not including a sale for resale.

II

Supplemental brief

The question raised by the Court is briefed in Point I. Certain extraneous statements made by the amicus curiae and the City in the so-called Outline of Oral Argument and in Opening Brief following Argument require brief attention.

A. Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent

Contrary to the statement in the Outline of Oral Argument (p. 17), the Government has never argued "that section 6 requires public distribution of the energy, meaning thereby without the intervention of an agent" and there is nothing in the decree which requires that the City make distribution without an agent.

The prohibition of the statute is against the granting to an individual or private corporation of the right to sell. Solicitor Edwards recognized that it did not prohibit employment of an agent for transmission purposes (R. 353–355) and the Government has never contended to the contrary. The thing prohibited is a grant by the City to a private individual or corporation which will carry with it the right, either as owner or agent, to sell water or energy delivered to such individual or corporation by the City (see Gov't Br., p. 67).

B. The Raker Act forbids the City to grant to a private company the right to sell the energy irrespective of whether the company is acting as an agent or as a buyer

As stated in the City's brief (pp. 12–18), section 6 of the Raker Act prohibits sale for resale; but it is equally true that the section prohibits the granting, by way of agency or otherwise, of the right to sell. It has never been the Government's position that section 6 prohibited only a sale for resale. It was, and still is, its position that the facts here show that there was a sale; however, the breach occurs not in the sale, but in transferring with it the right to sell. Hence, any method or means whereby the City confers upon the Pacific Gas & Electric Company, or any other private corporation or individual, the privilege of selling this energy, as a matter of right, in the course of such transferee's business is equally violative of the provisions of the Act and subject to injunction. It should be recalled, however, that in this case the trial court found, upon ample evidence, that the City did in fact sell the energy to the Pacific Gas & Electric Company for resale by that company.

1. The fact that the pertinent language of section 6 of the Raker Act is identical with and possibly derived from section 6 of the Act of June 30, 1906, c. 3926, 34 Stat. 803 (Br. 18–25) is important only to rebut the thought that the language was derived from the California Constitution, Art XIV, sec. 2. Other than that, it has but little relevance

here. Certain features of the origin of this Act should be noted, however.

A certified copy of the complete letter of President Theodore Roosevelt to Secretary of the Interior Hitchcock, as it appears in the files of the Interior Department, is printed in the Appendix, p. 26. From this it appears that the sole controversy occasioning intervention of the President was whether the municipality of Los Angeles should have the right to convey water across the public lands for purposes of irrigation.

The prohibition against selling or letting to an individual or corporation the right to sell water given to it or him by the City of Los Angeles, so far as appears, originated with the President. And it appears from his letter that this suggestion was inspired by the fact that his attention had been drawn to the right of private power interests, in the absence of law "to seek their own pecuniary advantage in securing the control of this necessary of life for the city." His underlying purpose in suggesting the prohibition is made plain by a part of the letter carefully omitted by appellant:

> * * * it ought not to be within the power of private individuals to control such a necessary of life as against the municipality itself.

Thus, even in the genesis of the precursor of the provision here involved, the underlying object was not merely to prevent private ownership of the

water with the right to resell but to prevent the vesting of control of the water in private interests. The City suggests no other reason for inclusion of section 6 in either the Owens River enactment or the Raker Act.

It was thus quite appropriate that in limiting the scope of the law, President Roosevelt, not a lawyer, should use "given" as including any manner of acquisition of control of the water either by transfer of title or merely of possession. The fact that this properly measures the underlying objective probably explains why the phrase, "for irrigation purposes," was omitted when the additional section was drafted. If any significance is to be given to the fact that section 6 of the Raker Act was possibly derived from section 6 of the Los Angeles grant, it must be noted that the phraseology adopted was that of a layman, giving added weight here to the general rule that Congress is to be presumed to have used words in their known and ordinary signification, and that the popular or received import of words furnishes the general rule for the interpretation of public laws. *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560; *United States* v. *Wurts,* 303 U. S. 414, 417.[2]

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[2] Webster's New International Dictionary (2d ed., Unabridged) defines "sale": "a contract whereby the absolute, or general, ownership of property is transferred from one person to another for a price, or sum of money, or, loosely,

Other than the naked language of the letter there is no showing of the intention of the President, and other than the same naked words of section 6 of the Owens River Act there is no showing of the intention of that Congress in enacting that section.

2. Here the broad meaning of the words themselves embracing grant of the right to sell by agency agreement as well as by a sale is confirmed by many manifestations of the intent of Congress to prevent private control of the water or energy generated at Hetch Hetchy. Pertinent quotations from the Congressional Record are found in the opinion of the court below (R. 98–100), the opinion of Secretary Ickes (R. 264–266), and the opinion of Solicitor Edwards (R. 348–352). Since throughout the consideration of this legislation there was common agreement as to purpose, these statements made in debate may properly be considered in determining what the purpose was and the evils sought to be remedied. *Federal Trade Comm.* v. *Raladam Co.,* 283 U. S. 643, 650; *Humph-*

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for any consideration"; "sell": "to transfer (property) for a consideration; * * * to give up for a valuable consideration; to dispose of in return for something"; "let": "to give or assign, as a work or contract; —often with *out;* as, to *let* a farm, a house; to *let* out the lathing and the plastering. * * * To permit; allow; suffer; —either affirmatively, by positive act, or negatively, by neglecting to restrain or prevent; as, *let* to bail * * *." It seems clear that understood in this popular sense the statute embraces the transfer of the right to sell, even under an agency agreement, in return for the promises of the Company.

rey's Executor v. *United States,* 295 U. S. 602, 625.

The absence of debate in connection with the Owens River Act is to be compared with the lengthy debate on the Hetch Hetchy Bill in the House (covering more than 100 pages of the Congressional Record) and in the Senate (covering more than 200 pages). The reason is plain. In the Owens River grant the United States was granting a right-of-way over a forest reserve, whereas here it was granting rights in a national park as well.[3] There is a fundamental difference between these two types of reservations. The establishment and

---

[3] By the Act of June 30, 1864, c. 184, 13 Stat. 325, Congress granted to the State of California the "Cleft or Gorge" in the Sierra Nevada Mountains known as the Yo-Semite Valley. By Act of October 1, 1890, c. 1263, 26 Stat. 650, 16 U. S. C. sec. 44, Congress set aside and reserved as forest lands an area surrounding the Yosemite Gorge and including the Hetch Hetchy Valley. By Act of February 7, 1905, c. 547, 33 Stat. 702, Congress segregated and set aside as Yosemite National Park the major portion of the forest reserve, including both the Hetch Hetchy Valley and the area surrounding the grant to the State, and including as well certain additional lands not important here. By Joint Resolution of June 11, 1906, 34 Stat. 831, 16 U. S. C. sec. 48, Congress accepted and ratified recession of the lands granted to the State of California in 1864. The parts of Stanislaus National Forest through which the aqueduct and transmission line of the City extend were reserved by Presidential Proclamation of July 25, 1905, under Act of March 3, 1891, c. 561, sec. 24, 26 Stat. 1103, and by proclamation of October 26, 1907, under Act of June 4, 1897, c. 2, 30 Stat. 36.

161033—39——3

administration of national parks involves the permanent sequestration of natural objects and the inviting of the public to enter and use the areas, even the offering of inducements to accomplish this object. Such a use is incompatible with the granting of rights in national parks to commercial interests except such as will facilitate the use of the parks for recreational purposes. The national forest reservations are established and administered primarily for the preservation of the forests for commercial exploitation, and the use of the areas by the public is subordinate to that object. This use is consistent with the granting of rights in national forests to commercial interests. Because of this difference in the nature and objects of the reservations, Congress has always been more lenient in granting rights to commercial interests in national forests than in the case of national parks. This is illustrated by the fact that Congress has reserved to itself the sole power to grant authorizations for works for the storage or carriage of water within national parks. See Act of March 3, 1921, c. 129, 41 Stat. 1353, 16 U. S. C. sec. 797(d). The debates in Congress show that opposition to the Raker Act came from those who stressed the fact that this land had been dedicated to the use of all as a national park and were opposed to any grant of privilege therein which might come under the control of private interests or which might be regarded as opening the door to grants to private

interests of rights in this or any other national park. 50 Cong. Rec., pp. 3898–3899, 3911–3912, 3918, 3971, 4094–4095, 4098–4099, 4110, 5495; 51 Cong. Rec., pp. 182, 367, 380. See also 50 Cong. Rec., Part 7, Appendix, pp. 457–464, distinguishing between grants in forest reserves and in national parks. In no instance, either by congressional or administrative action, has any private commercial power development been allowed to invade a national park although such development is permitted in national forests. See Act of June 10, 1920, c. 285, sec. 4, 41 Stat. 1065, as amended by Act of March 3, 1921, 41 Stat. 1353, 16 U. S. C. sec. 797(d).

3. The ellipsis in section 6 of the Raker Act suggested by the City (Br. 3–7) is patently manufactured.

This Court is not to be misled by the reference in the City's brief (p. 4) to the Owens River bill:

> We wish to rivet attention on the word "*given*" because it was contained *in the first* draft of the prohibition, was not there associated with the words "sold or" but stood alone. *The words "sold or given" appeared for the first time in the second draft.*

Development in form of the Owens River bill enacted by another Congress is plainly without any significance in ascertaining the intent of the 63d Congress in the Raker Act. As is shown by the City's brief (pp. 26–27) both "given" and "sold"

appeared in the drafts of the Raker Act from the beginning.

Reading of section 6 in its plain grammatical sense makes it clear that the words "given" or "sold or given" are in no way the correlative of the prohibited "selling or letting." The participles, "selling or letting," are used as nouns, object of "from" in the prepositional phrase, "from selling or letting," which modifies the verb, "prohibited." On the other hand, "sold or given to it or him by the said grantee" describes and modifies "water or the electric energy" in the same phrase. Obviously, "given" cannot mean the same thing as "selling or letting."

Aside from the fact that the alleged ellipsis authorizing insertion of additional words is without support in reason, the City's contention is negatived by the fact that in debate Representative Thomson, a member of the House Committee on Public Lands, called specific attention to the difference between this prohibition against selling or letting the "right to sell" and a prohibition against selling or letting "any water or electric energy" such as the City suggests is the true meaning of this statute (50 Cong. Rec., p. 3999, August 30, 1913):

> Mr. Chairman, in answering the question of the gentleman from Colorado, I would like to call his attention to the fact that the subject of sale as printed in this section is not the power or the water, but the right to sell the power or the water.

The City concedes that "given" has many significations (Br. 6) and does not question that "give" may properly be used in the sense of mere delivery or transfer of possession without the conferring of title. *Smith* v. *Burnet,* 35 N. J. Eq. 314, 324; *Thompson* v. *West,* 56 N. J. Eq. 660, 665, 40 Atl. 197; *Roland* v. *Schrack,* 29 Pa. 125, 127; *Spencer* v. *Potter's Estate,* 85 Vt. 1. However it invokes the rule *noscitur a sociis* here to make "given" mean the same as "sold" (City's Br. 5). But the maxim cannot be employed to render general words meaningless in disregard of the primary rules that effect should be given to every part of a statute, if legitimately possible (*Market Co.* v. *Hoffman,* 101 U. S. 112, 115; *Ex Parte Public Bank,* 278 U. S. 101, 104) and that words of a statute or other document are to be taken according to their natural meaning. *Mason* v. *United States*, 260 U. S. 545, 553–554. Since the City excludes the meaning: transfer of title without consideration,[4] it follows that if pursuant to these rules any effect is to be attached to the word "given," it must necessarily here mean mere transfer of possession, such as that incidental to an agency.

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[4] The assertion of the City is (Br. 5):

"When these drafts were drawn, it is to be presumed that the idea of a municipality making a gift of water or electric energy to a corporation or individual was not thought of, and that therefore, as a matter of actual intent, that possibility was not present in the minds of those who drafted or adopted the prohibition."

The appellant's manufactured ellipsis requires interpolation of words changing the plain meaning, unduly limits the operation of the statute, and ignores its underlying purpose apparent from its face and as indicated by the committee report and congressional debates.

The language of the statute is plainly broad enough to inhibit the obtaining of private control of water or energy originating at Hetch Hetchy either by sale for resale or by the granting of an agency. Even were the citations to congressional debates deemed conclusively to show that Congress did not at the time of the enactment have in mind the possibility of evasion of the prohibition by an agency agreement, that would not be enough. To exclude such an agreement from the operation of the Act it is necessary to go further and to say that if the possibility had been foreseen, Congress would have so varied its comprehensive language as to exclude such agency from the operation of the Act. *Puerto Rico* v. *Shell Co.,* 302 U. S. 253, 257.

C. The Raker Act is to be construed liberally in aid of the evident public object

In the course of oral argument the invocation of the recognized rule of liberal construction otherwise here applicable (Gov't Br. p. 64) was questioned in view of the fact that the Act in the proviso to section 6 contains a forfeiture clause which is subject to the rule of strict construction.

The second clause of section 6, stated in the form of a proviso, plainly does not relate to the same subject matter as, or restrain, modify, or other-

wise affect, the first clause. The word "Provided" has no significance here, simply serving to separate or distinguish the two clauses. *Georgia Banking Co.* v. *Smith,* 128 U. S. 174, 181; *McDonald* v. *United States,* 279 U. S. 12, 22.

The rule properly to be applied appears to be that the forfeiture provision is to be strictly construed, but the statute in its other principal features, including the first clause of section 6 here involved, is, as in the case of a remedial statute, to be liberally construed in aid of the evident public object. *Smith* v. *Townsend,* 148 U. S. 490, 497; *State* v. *Shevlin-Carpenter Co.,* 99 Minn. 158, 162, 108 N. W. 935, 936; cf. *Eyre* v. *Harmon,* 92 Cal. 580, 587–588, 28 Pac. 779; see Sutherland, Statutory Construction (1904 ed.), sec. 337, p. 646, sec. 533, p. 991.

D. Paragraph (3) of the decree does not forfeit the rights of the City

The City's brief (pp. 35–38) and the Outline of Oral Argument (pp. 4–7) apparently are to be read together.

The Government has never contended that the provision under consideration here is *stricti juris* a condition; it is a restrictive provision inserted by the Government as grantor in a statutory conveyance. The limitation imposed by section 6 on the manner of use of the granted lands [5] is analogous to the limitation enforced in

[5] In support of its contention that it owned all the water rights now claimed in the Hetch Hetchy Valley at the time of the Raker Act, the City merely cites congressional debates which, of course, have no weight on that question

Oreg. & Cal. R. R. Co. v. *United States,* 238 U. S. 393, and as held by the court below (R. 101–104) is equally effective and valid.

Paragraph (3) of the decree is not subject to criticism as being in effect a forfeiture of the rights granted (Outline of Oral Argument, p. 5). There is, of course, no question of forfeiture involved in the enforcement by injunction of the first clause of section 6, here invoked, since it is merely an express limitation on the exercise of the rights and privileges granted. Paragraph (3) in form purports to declare no forfeiture. Furthermore, read with paragraph (2) it is apparent that its effect is merely to enjoin what is in substance a continuing trespass upon the lands of the United States insofar as those lands are used for a purpose not contemplated by the grant. *Van O'Linda* v. *Lothrop,* 21 Pick. (Mass.) 292, 297; *Ganley* v. *Looney,* 96 Mass. (14 Allen) 40, 42 (1867); *Shock* v. *Lumber Co.,* 107 W. Va. 259, 263, 148 S. E. 73.

(Br. 40–44). The right to appropriate waters on the public lands of the United States deraigns not from the State but from the United States as owner of such running water on the public lands. *California Power Co.* v. *Beaver Cement Co.*, 295 U. S. 142, 162; *Brush* v. *Commissioner*, 300 U. S. 352, 367; *Lux* v. *Haggin*, 69 Cal. 255, 336 et seq., 10 Pac. 674. As against the paramount authority of the United States, no rights in the water on the lands of the national park and forest reservation vested in the City until, under authority of the Raker Act, it had completed the works essential to the diversion and application to beneficial use. *Silver Lake, etc., Co.* v. *Los Angeles*, 176 Cal. 96, 103–104, 167 Pac. 697.

Injunction, of course, is the proper remedy to inhibit the use of the flowage waters, dam, aqueduct, and transmission lines (which occupy the easement) for purposes other than those specifically designated in the grant of the easement. *Gray* v. *Cambridge,* 189 Mass. 405, 76 N. E. 195; *Winslow* v. *City of Vallejo,* 148 Cal. 723, 727–728, 84 Pac. 191.

The decree clearly does not declare a forfeiture of any right of the City. In its effect it is not distinguishable from that directed to be entered in *Mendelson* v. *McCabe,* 144 Cal. 230, 77 Pac. 215. Injunction thereunder will merely inhibit the exercise of a privilege usurped; it will not deprive the City of any right conferred upon it.

CONCLUSION

It is respectfully submitted that the decree of the court below should be affirmed.

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Assistant Attorney General.

Frank J. Hennessy,
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Attorney,
Department of Justice, Washington, D. C.

July 1939.

APPENDIX

The pertinent sections of the California Constitution of 1879 provide:

Article XI:

> SEC. 19. In any city where there are no public works owned and controlled by the municipality, for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.

Article XI (as amended October 10, 1911):

> SEC. 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service, or other means of communication. Such works may be acquired by original construction or by the purchase of existing works,

including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance.

Article XIV.

SEC. 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city, or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water

> rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city, or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city, or town, where the same are collected, for the public use.
>
> SEC. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.

On December 19, 1913, the charter of the City and County of San Francisco, Art. II, c. II provided:

> SEC. 1. Subject to the provisions, limitations and restrictions in this charter contained, the board of supervisors shall have power:
>
> *　　*　　*　　*　　*
>
> 2. Except as otherwise provided in this charter, or in the constitution of the State of California, to regulate and control for any and every purpose, the use of the streets, highways, public thoroughfares, public places, alleys, and sidewalks of the city and county.
>
> 14. To fix and determine by ordinance in the month of February of each year, to take effect on the first day of July thereafter, the rates or compensation to be collected by any person, company or corporation in the city and county, for the use of water, heat, light or power, supplied to the city and county, or

to the inhabitants thereof, and to prescribe the quality of the service.

SEC. 5. No exclusive franchise or privilege shall be granted for laying pipes, wires or conduits.

SEC. 6. The board of supervisors shall have power to grant authority for a term not exceeding twenty-five years to construct and operate street railways upon, or over, or under, the streets or parts of streets of the city and county not reserved for boulevards or carriage driveways, upon the following conditions and in the following manner and none other:

Upon application being made to the board for any such franchise, it shall by resolution determine whether such franchise or any part thereof should be granted, and at said time shall determine on what conditions the same shall be granted additional to those conditions provided in this chapter. After such determination, it shall cause notice of such application and resolution to be advertised in the official newspaper of the city and county for ten consecutive days. Such advertisement must be completed not less than twenty nor more than thirty days before any further action is taken by the board on such application. The advertisement must state the character of the franchise sought, the term of its proposed continuance, and the route to be traversed; that sealed bids will be received up to a certain hour on a day to be named in the advertisement; and a further statement that no bids will be received of a stated amount, but that all bids must be for the payment to the city and county in lawful money of the United States of a stated percentage of the gross annual receipts of the person, company or corpora-

tion to whom the franchise may be awarded, arising from its use, operation, enjoyment, or possession. * * *

SEC. 7. The supervisors shall have no power to grant franchises or privileges to erect poles or wires for transmitting electric power or for lighting purposes along or upon any public street or highway of the city and county except upon all the conditions and in the manner, including competitive bidding and payment of a percentage of gross receipts, hereinbefore set out, and upon the further condition that the board shall at all times have the right to regulate the charges of any person, company or corporation using, enjoying or possessing such franchise or privilege.

* * * * *

[Copy]

THE WHITE HOUSE,
Washington, June 25, 1906.

MY DEAR MR. SECRETARY: As I think it best that there should be a record of our attitude in the Los Angeles Water Supply bill, I am dictating this letter to you in your presence, and that of Senator Flint on behalf of the California Delegation, of Director Walcott of the Geological Survey, and of Chief Forester Pinchot. The question is whether the city of Los Angeles should be prohibited from using the water it will obtain under this bill for irrigation purposes. Your feeling is that it should be so prohibited because the passage of the bill without the prohibition might establish a monopoly in the municipality of Los Angeles as regards irrigation, by permitting the municipality to use the surplus of the water thus acquired, beyond the

amount actually used for drinking purposes, for some irrigation scheme.

Senator Flint states that under the proposed law Los Angeles will be seeking to provide its water supply for the next half century, which will mean that at first there will be a large surplus, and that in order to keep their rights they will have to from the beginning draw the full amount of water (otherwise the water will be diverted to other uses and could not be obtained by the city); and while if the city did not need the water it would be proper that the other users should have it, yet it is a hundred or a thousand fold more important to the State and more valuable to the people as a whole if used by the city than if used by the people of Owens Valley. Senator Flint further says that the same water that is used for drinking and washing is also used on innumerable little plots of land in and around Los Angeles for gardening and similar purposes, and that to prohibit this would so nearly destroy the value of the bill as to make it an open question whether the city either could or would go on with the project; it being open to doubt whether the words "domestic use" would cover irrigation of this kind.

Mr. Walcott and Mr. Pinchot state that there is no objection to permitting Los Angeles to use the water for irrigating purposes so far as there is a surplusage after the city's drinking, washing, fire, and other needs have been met. They feel that no monopoly in an offensive sense is created by municipal ownership of the water as obtained under this bill, and that as a matter of fact to attempt to deprive the city of Los Angeles of the right to use the water for irrigation would mean that for many

years no use whatever could be made by it of the surplus water beyond that required for drinking and similar purposes.

I am informed by Senator Flint that the law of California provides that if a municipality sells water to people outside the municipality, it must be at the same rate that it sells it to those within the municipality.

I am also impressed by the fact that the chief opposition to this bill, aside from the opposition of the few settlers in Owen's Valley (whose interest is genuine, but whose interest must unfortunately be disregarded in view of the infinitely greater interest to be served by putting the water in Los Angeles) comes from certain private power companies whose object evidently is for their own pecuniary interest to prevent the municipality from furnishing its own water. The people at the head of these power companies are doubtless respectable citizens, and if there is no law they have the right to seek their own pecuniary advantage in securing the control of this necessary of life for the city. Nevertheless, their opposition seems to me to afford one of the strongest arguments for passing the law, inasmuch as it ought not to be within the power of private individuals to control such a necessary of life as against the municipality itself.

Under the circumstances I decide, in accordance with the recommendations of the Director of the Geological Survey and the Chief of the Forestry Service, that the bill be approved, with the prohibition against the use of the water by the municipality for irrigation struck out. I request, however, that there be put in the bill a prohibition

against the City of Los Angeles ever selling or letting to any corporation or individual except the municipality, the right for that corporation or that individual itself to sell or sublet the water given to it or him by the city for irrigation purposes.

Sincerely yours,

(signed) THEODORE ROOSEVELT.

Hon. E. A. HITCHCOCK,
Secretary of the Interior.

P. S.—Having read the above aloud, I now find that everybody agrees to it—you, Mr. Secretary, as well as Senator Flint, Director Walcott, and Mr. Pinchot; and therefore I subscribe to it with a far more satisfied heart than when I started to dictate this letter.

U. S. GOVERNMENT PRINTING OFFICE: 1939

No. 9133

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN, a corporation,

Appellants,

vs.

PALO VERDE IRRIGATION DISTRICT, an Irrigation District,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

FILED

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellees:

Messrs. STEWART, SHAW & MURPHEY,
ARVIN B. SHAW, JR., Esq.,
835 Rowan Bldg., Los Angeles, California. [1*]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States for the Southern District of California, Central Division.

No. 31992-C
(In Bankruptcy)

In the Matter of Petition of PALO VERDE IRRIGATION DISTRICT, an Irrigation District, for Composition of Debts.

CITATION ON APPEAL

United States of America—ss.

To the Palo Verde Irrigation District, Petitioner in the Above Entitled Proceeding, and to all Attorneys and Solicitors of Record of said Party:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 30th day of November, 1938, pursuant to the appeal duly obtained and filed in the office of the Clerk of the above entitled court and in the above entitled cause, in which said appeal the following persons are appellants: James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin, a corporation, and in which said appeal the Palo Verde Irrigation District is appellee, and you are [2] required to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy jus-

tice should not be done to the parties in that behalf.

Witness, the Honorable George Cosgrave, United States District Judge for the Southern District of California, this 31st day of October, 1938, and of our Independence the 163rd.

G. COSGRAVE,
United States District Judge.

Received copy this 1st day of November, 1938.

STEWART, SHAW & MURPHEY,
By ARVIN B. SHAW, JR.

[Endorsed]: Filed Nov. 1, 1938. [3]

[Title of District Court and Cause.]

PETITION FOR COMPOSITION OF DEBTS.

To the Honorable, the Judge of the Above-Entitled Court:

Palo Verde Irrigation District, an irrigation district, files its petition for composition of debts and alleges:

I.

That Petitioner is an irrigation district duly organized on October 27, 1923, and now existing under and by virtue of the provisions of that certain Act of the Legislature of the State of California known as the "Palo Verde Irrigation District Act", (Stats. Cal. 1923, p. 1067) approved June 21, 1923, as amended.

II.

That the lands within the boundaries of Petitioner aggregate 95,000 acres and are situate in the Counties of Riverside and Imperial, California and in said Southern District of California, Central Division. That the major part of said lands is situate in said County of Riverside. That the office of Petitioner is situate in the City of Blythe, in said County of Riverside.

III.

That said Petitioner was organized for the purposes of taking over and merging in one organization the properties and functions of three separate entities theretofore existing in the territory known as the Palo Verde Valley, which territory is now embraced within the boundaries of Petitioner. That said three entities consisted of Palo Verde Mutual Water Company, a private corporation owning and operating an irrigation system in said Valley, Palo Verde [5] Joint Levee District of Riverside and Imperial Counties, California, a levee district owning and operating a levee system in said Valley, and Palo Verde Drainage District, a drainage district owning and operating a drainage system in said Valley.

IV.

That said Mutual Water Company was duly organized under the laws of the State of California on March 9, 1908, for the principal purpose of constructing, operating and maintaining an irrigation

system in said Valley, and did construct, operate and maintain such system until the transfer of said system to Petitioner, as hereinafter alleged. That on or about February 1, 1916, said Mutual Water Company executed a certain deed of trust, dated on said day, wherein and whereby it conveyed said irrigation system to Los Angeles Trust & Savings Bank, a banking corporation, in trust as security for the payment of coupon bonds of said Mutual Water Company dated on said day, in the aggregate principal amount of $500,000.00, payable serially on February 1 of each year from 1921 to 1936, inclusive, with interest at the rate of six (6%) per cent per annum, payable February 1 and August 1 of each year. That said deed of trust was duly recorded in the office of the County Recorder of said County of Riverside in Book 443 of Deeds at Page 1, et seq. That thereafter said Mutual Water Company sold and issued all of said bonds. That there now remain unpaid bonds of said issue in the principal amount of $170,000.00, together with interest coupons thereon maturing August 1, 1932, and thereafter. That by reason of various consolidations of banks, Security-First National Bank of Los Angeles, a national banking association, has succeeded to the office of trustee under said deed of trust.

V.

That, pursuant to the provisions of Section 11 of said Palo Verde Irrigation District Act, said Mutual Water Company transferred its said irrigation

system to Petitioner by deed dated December 1, [6] 1925, and in and by said deed Petitioner assumed and agreed to pay when due the principal and interest on each and all of the bonds secured by said deed of trust then remaining unpaid. That said deed was duly recorded in the office of the County Recorder of said County of Riverside in Book 662 at Page 152 of Official Records of said County.

VI.

That said Levee District was duly organized on June 17, 1914, under and by virtue of the provisions of that certain Act of the Legislature of the State of California entitled "An act to provide for the formation of levee districts in the various counties of this state, and to provide for the erection of levees, dikes and other works for the purpose of protecting the lands within such districts from overflow and to levy assessments to erect and construct and maintain such levees, dikes and other works and to pay the necessary costs and expenses of maintaining said districts", (Stats. Cal. 1905, p. 327) approved March 20, 1905, as amended. That said Levee District constructed, operated and maintained a levee system in said Palo Verde Valley until the organization of Petitioner. That on or about May 1, 1918, said Levee District authorized, pursuant to the provisions of that certain Act of the Legislature of the State of California entitled "An act authorizing levee districts of the state to incur a bonded indebtedness for the purpose of building,

constructing, or repairing levees of the district; or for excavating and constructing ditches or canals of such districts; or for the purpose of acquiring rights of way for any such levees, ditches, or canals; or for any and all of said purposes", (Stats. Cal. 1911, p. 303) approved March 8, 1911, as amended, an issue of coupon bonds of said District designated "First Issue", dated May 1, 1918, in the aggregate principal amount of $1,253,951.86, payable serially on May 1 of each year from 1919 to 1958, inclusive, with interest at the rate of 6½% per annum payable May 1, and November [7] 1 of each year thereafter. That thereafter said Levee District sold and issued all of said bonds. That there now remain unpaid bonds of said First Issue in the principal amount of $911,951.86, together with substantially all interest coupons thereon maturing May 1, 1930, and thereafter.

VII.

That on or about November 1, 1922, said Levee District authorized, pursuant to the provisions of said Act, approved March 8, 1911, an issue of coupon bonds of said district, designated "Second Issue", dated November 1, 1922, in the aggregate principal amount of $371,378.50, payable serially on November 1 of each year from 1923 to 1962, inclusive, with interest at the rate of 6½% per annum payable May 1 and November 1 of each year. That said Levee District thereafter sold and issued all of said bonds. That there now remain unpaid bonds of said Second Issue in the principal amount of

$304,378.50, together with substantially all interest coupons thereon maturing May 1, 1930, and thereafter.

VIII.

That by virtue of the provisions of Section 12 of said Palo Verde Irrigation District Act said Levee District was, upon the organization of Petitioner, merged in and superseded by Petitioner and ceased to exist except in so far as may be necessary to preserve the rights of bondholders and other creditors, and Petitioner assumed all of the outstanding indebtedness of said Levee District, including the principal and interest on said bonds of said First and Second Issues.

IX.

That said Drainage District was duly organized on August 16, 1921, under and by virtue of the provisions of that certain Act of the Legislature of the State of California entitled "An act to provide for the organization and government of drainage districts, for the drainage of agricultural lands other than swamp and overflowed [8] lands, and to provide for the acquisition or construction thereby of works for the drainage of the lands embraced within such districts" (Stats. Cal. 1903, p. 291) approved March 20, 1903, as amended. That said Drainage District constructed, operated and maintained a drainage system in said Palo Verde Valley until the organization of Petitioner. That on or about December 1, 1921, said Drainage District authorized, pursuant to said Act approved March 20, 1903, an

issue of coupon bonds, dated December 1, 1921, in the aggregate principal amount of $850,000.00, payable serially on January 1 of each year from 1933 to 1942, inclusive, with interest at the rate of 6% per annum payable January 1 and July 1 of each year. That thereafter said Drainage District sold and issued bonds of said issue of the aggregate principal amount of $250,000.00 and said Petitioner, after its organization, sold and issued bonds of said issue of the aggregate principal amount of $600,000.00. That all bonds of said issue are now unpaid, together with substantially all interest coupons thereon maturing July 1, 1930, and thereafter.

X.

That by virtue of the provisions of Section 13 of said Palo Verde Irrigation District Act said Drainage District was, upon the organization of Petitioner, merged in and superseded by Petitioner and ceased to exist except in so far as may be necessary to preserve the rights of bondholders and other creditors, and Petitioner assumed all of the outstanding indebtedness of said Drainage District, including the principal and interest on all said bonds authorized by said Drainage District.

XI.

That on or about September 1, 1925, pursuant to the provisions of said Palo Verde Irrigation District Act, Petitioner authorized an issue of coupon bonds designated "First Issue", dated on said day,

in the aggregate principal amount of $3,287,000.00, payable serially on July 1 of each year from 1937 to 1955, inclusive, with interest [9] at the rate of 6% per annum payable January 1 and July 1 of each year. That thereafter Petitioner sold and issued bonds of said First Issue in the aggregate principal amount of $1,725,000.00, all of which said bonds, together with substantially all interest coupons thereon maturing July 1, 1930, and thereafter, are now unpaid. That on June 15, 1934, pursuant to the provisions of Section 23 of said Palo Verde Irrigation District Act, as amended, the unsold bonds of said First Issue, aggregating in principal amount $1,562,000.00, were destroyed.

XII.

That on or about September 1, 1925, pursuant to the provisions of said Palo Verde Irrigation District Act, Petitioner authorized an issue of coupon bonds designated "Second Issue", dated on said day, in the aggregate principal amount of $213,000.00, payable serially on July 1 of each year from 1937 to 1955, inclusive, with interest at the rate of 6% per annum payable January 1 and July 1 each year. That thereafter Petitioner sold and issued all of said bonds of said Second Issue, all of which said bonds, together with substantially all interest coupons thereon maturing July 1, 1930, and thereafter, are now unpaid.

XIII.

That on or about February 1, 1930, Petitioner, for value reveived, executed its promissory note, dated on said day, payable to the order of D. A. Foley & Co. and assigned to Bank of America, for the principal sum of $4,000.00, payable January 2, 1932, with interest thereon at the rate of 7% per annum. That said note, together with interest thereon from date thereof, is unpaid.

XIV.

That Petitioner is unable to meet its obligations above mentioned as they mature and that it desires to effect a plan for the composition of its debts under the provisions of Sections 81, 82 and 83 of that certain act of the Congress of the United States of America, [10] entitled "An act to establish a uniform system of bankruptcy throughout the United States", as amended. That on account of adverse agricultural conditions in said Palo Verde Valley and the general depression which has prevailed during the greater part of the past twelve years, the market value of farm products produced within said valley had been generally less than the cost of production; that farming operations therein have been unprobitable; that petitioner in good faith levied taxes to pay its bonded indebtedness and operating expenses from the year 1927 to 1932, inclusive, but said taxes were greater than the ability of the land to produce, or of the farmers to pay

and Petitioner was, is and will continue to be unable to collect sufficient taxes to pay said obligations.

XV.

That a plan of composition of indebtedness has been prepared and is filed and submitted with this petition, to-wit, is attached to this petition, marked "Exhibit A" and by this reference made a part hereof.

That (1) the procedure to be followed, respectively, in the levy and collection of taxes, special assessment taxes or special assessments for the payment of the refunding bonds referred to in said plan of composition, (2) the character and effect of, and method of enforcing the liens sought to be created by the issuance of such refunding bonds and (3) the rights of the holders of such refunding bonds upon the issuance thereof, are in all respects such as are prescribed by the Palo Verde Irrigation District Act and acts amendatory thereof and supplementary thereto.

XVI.

That the unpaid coupon bonds herein mentioned and said note evidence the only indebtedness to be affected by said plan of composition and the holders of said bonds and note are the only creditors of Petitioner affected by said plan within the meaning [11] of said Act of Congress. That none of said indebtedness is owned or held by Petitioner.

XVII.

That Reconstruction Finance Corporation, an agency of the United States of America, owns and holds not less than fifty-one (51) per centum in amount, viz., more than ninety-six (96) per centum in amount, of all indebtedness affected by said plan of composition. That said corporation owns and holds said promissory note and not less than fifty-one (51) per centum in amount, viz., more than ninety-five (95) per centum in amount, of each of the issues of bonds above mentioned. That a true and correct list of said securities owned and held by said corporation is hereto attached, marked "Exhibit B" and by this reference made a part hereof.

XVIII.

That on May............., 1938, said Reconstruction Finance Corporation, in writing dated on said day, accepted said plan of composition. That said Reconstruction Finance Corporation has authorized a loan to Petitioner in the sum of $1,039,423.00, to enable it fully to effect said plan.

XIX.

That a list of all known creditors affected by said plan, other than said Reconstruction Finance Corporation, with their addresses, so far as known to Petitioner, and a description of their respective securities, so far as is known, which list shows only persons who have not accepted said plan, is hereto attached, marked "Exhibit C" and by this reference

made a part hereof. That said "Exhibit C" has been compiled from the best sources of information available to Petitioner and is supposed by Petitioner to be correct, but is intended by Petitioner as a list of claims and not as an admission of liability to the particular persons listed. Transfers of bonds or coupons thereof listed on said "Exhibit C", or interest therein, either voluntary or by operation of law, may have occurred unknown to Petitioner and to Petitioner's sources of information and [12] Petitioner does not therefore intend by this paragraph to allege or admit the acutal legal or equitable ownership of any bonds or coupons so listed, nor does petitioner admit the authenticity of any purported bonds or coupons held by any of the holders so listed, nor does Petitioner intend hereby to acknowledge any of said bonds or coupons so listed which are barred by any statute of limitations. That all claims against Petitioner are payable from taxes levied against the lands within Petitioner and are of a single class.

XX.

That a condensed summary showing separately the amounts and percentages of said indebtedness held respectively by said Reconstruction Finance Corporation and by others who have not accepted said plan is hereto attached, marked "Exhibit D" and by this reference made a part hereof.

XXI.

That said plan of composition is fair, equitable and for the best interests of Petitioner's creditors who are affected thereby and does not discriminate unfairly in favor of any creditor or class of creditors.

XXII.

That on the 10th day of May, 1938, the Board of Trustees of said Petitioner adopted a resolution proposing said plan of composition. That a certified copy of said resolution is hereto attached, marked "Exhibit E", and by this reference made a part hereof. That in and by said resolution said Petitioner authorized the filing of this petition and authorized Messers. Stewart, Shaw & Murphey, its duly and regularly appointed attorneys, to file the same and to represent Petitioner in the proceedings with respect thereto in the competent United States District Court.

XXIII.

That the following designated actions have heretofore been commenced in the Superior Court of the State of California, in and [13] for the County of Riverside, against Petitioner, and in some cases against said Levee District or said Drainage District, upon bonds or coupons, or both, issued by one or more of said three districts, for the purpose of obtaining judgments against Petitioner and said Levee District or said Drainage District on account

of such bonds or coupons, or both, or the enforcement of lien or levy of taxes therefor, to-wit:

1. Case No. 25393, in which Theo. Bernhard is plaintiff and Petitioner and said Levee District are defendants and in which George Herrington, Esq., is attorney for plaintiff.

2. Case No. 25560, in which James H. Jordan is plaintiff and Petitioner and said Levee District are defendants and in which W. Coburn Cook, Esq., is attorney for plaintiff.

3. Case No. 25561, in which said Jordan is plaintiff and Petitioner and said Drainage District are defendants, and in which said Cook is attorney for plaintiff.

4. Case No. 25579, in which George F. Covell is plaintiff and Petitioner and the Counties of Riverside and Imperial are defendants and said Cook is attorney for plaintiff.

5. Case No. 25587, in which J. R. Mason is plaintiff and Petitioner, said Levee District and said Counties of Riverside and Imperial are defendants and said Cook is attorney for plaintiff.

6. Case No. 25588, in which First National Bank of Tustin, California, is plaintiff and Petitioner and said Drainage District are defendants and said Cook is attorney for plaintiff.

7. Case No. 25594, in which L. F. Abadie is plaintiff and Petitioner is defendant and said Cook is attorney for plaintiff.

8. Case No. 26604, in which said Mason is plaintiff and Petitioner, said Levee District and said

Counties of Riverside and Imperial are defendants and said Cook is attorney for plaintiff.

9. Case No. 28684, in which said Jordan, Mason, Bank and Abadie and C. F. Veysey are petitioners and Petitioner, its Board [14] of Trustees and officers and others are respondents and said Cook is attorney for plaintiff.

10. Case No. 28881, in which said Bank is plaintiff and Petitioner and said Drainage District are defendants and said Cook is attorney for plaintiff.

11. Case No. 28882, in which said Jordan is plaintiff and Petitioner and said Drainage District are defendants and said Cook is attorney for plaintiff.

12. Case No. 28883 in which said Jordan is plaintiff and Petitioner and said Levee District are defendants and said Cook is attorney for plaintiff.

XXIV.

That the following designated action has heretofore been commenced in the Superior Court of the State of California, in and for the County of Alameda, for the purpose of obtaining judgment against Petitioner on account of coupons of bonds issued by Petitioner to-wit:

1. Case No. 072243, in which N. J. Cornwall is plaintiff and Petitioner is defendant and Messrs. Clark Nichols & Eltse are attorneys for plaintiff.

XXV.

That the following designated action has heretofore been commenced in the Justice's Court of

Riverside Township, County of Riverside, State of California, for the purpose of obtaining judgment against Petitioner on account of coupons of bonds issued by Petitioner, to-wit:

1. Case No. 2204, in which C. F. Veysey is plaintiff and Petitioner is defendant, and said Cook is attorney for plaintiff.

XXVI.

That in said case No. 25560 a default judgment was rendered by said Superior Court in favor of plaintiff and against defendant Levee District, and in said cases Nos. 25561 and 25588 default judgments [15] were likewise rendered in favor of plaintiff and against defendant Drainage District, all on the 11th day of March, 1935. That Petitioner appealed from said judgments on behalf of said Levee District and Drainage District, respectively, and that said appeals are pending undetermined before the District Court of Appeal of the State of California, in and for the Fourth Appellate District. That in said actions Nos. 25560 and 25588 judgments were rendered by said Superior Court in favor of plaintiff and against Petitioner on the 7th day of April, 1937. That Petitioner has appealed from said judgments and said appeals are pending undetermined before said District Court of Appeal.

XXVII.

That unless restrained by order of this Court, the plaintiffs and their attorneys in each and all of the above described actions will take steps and

proceedings looking to the enforcement of the levy of taxes for the payment of bonds or coupons involved in said actions and that such proceedings would interfere with and prevent the carrying out of said plan of composition and would, in part, render ineffective the carrying out of said plan and would interfere with the jurisdiction of this Court herein and Petitioner would be irreparably damaged thereby.

Wherefore, Petitioner prays:

1. That an order be entered approving this petition as properly filed under Chapter X of said Act of Congress and fixing a time and place for a hearing on this petition, and for the giving of notice as required in said Chapter;

2. That orders be made, enjoining or staying, pending the determination of this matter, the commencement or continuation of suits against Petitioner, or any officer or inhabitant thereof, on account of the securities affected by the plan, or to enforce any lien or to enforce the levy of taxes or assessments for the payment of obligations under any such securities, or any suit or process to [16] levy upon or enforce against any property acquired by Petitioner through foreclosure of any such tax lien or special assessment lien;

3. That upon completion of the hearing on the plan an interlocutory decree be entered approving the plan and putting it into effect;

4. That upon completion of the plan of composition a final decree be entered, discharging Petitioner

from all debts and liabilities, in accordance with the plan; and

5. That the Court grant such further orders, decrees and relief in the premises as may be just and equitable.

PALO VERDE IRRIGATION DISTRICT,
By ROBERT A. GRANT,
President of Its Board of Trustees.

Attest:

WAYNE H. FISHER,
Secretary of said Board.
Petitioner

STEWART, SHAW & MURPHEY,
By ARVIN B. SHAW, JR.,
Its Attorneys.

[17]

State of California,
County of Riverside—ss.

R. A. Grant, being first duly sworn, deposes and says: That he is the duly elected, qualified and acting President of the Board of Trustees of Palo Verde Irrigation District, the Petitioner named in the foregoing petition, and makes this verification on its behalf; that he has been duly and regularly authorized by resolution of said Board to execute and verify this petition; that he has read said petition and knows the contents thereof and that the same is true of his own knowledge except as to the

matters which are therein stated upon his information or belief and as to those matters that he believes it to be true.

R. A. GRANT.

Subscribed and sworn to before me this 10th day of May, 1938.

[Seal] PETER GEISEL,
Notary Public in and for the
County of Riverside,
State of California.

[18]

EXHIBIT "A"

PLAN OF COMPOSITION
PALO VERDE IRRIGATION DISTRICT.

Palo Verde Irrigation District, being unable to meet its debts as they mature, desires to effect the following plan of composition:

Said debts consist principally of issued, outstanding and unpaid bonds issued or assumed by said District, to-wit, bonds issued by the following entities and in the amounts hereinafter set opposite the names of such entities, to-wit:

Palo Verde Mutual Water Company, Principal Amount	$ 170,000.00
Palo Verde Joint Levee District of Riverside and Imperial Counties, California, first issue, Principal Amount	$ 911,951.86
Palo Verde Joint Levee District of Riverside and Imperial Counties, California, second issue, Principal Amount	$ 304,378.50
Palo Verde Drainage District, Principal Amount	850,000.00
Palo Verde Irrigation District, first issue, Principal Amount	$1,725,000.00
Palo Verde Irrigation District, second issue, Principal Amount	$ 213,000.00
Total	$4,174,330.36

Together with certain unpaid coupons upon each of said bonds.

Said debts also include promissory note of said District payable to D. A. Foley & Co. in the principal amount of...... $4,000.00

This District proposes and offers to deliver to each and all of the owners and holders of any of the above mentioned bonds cash, or at District's option, the bonds of this District of the "Third Issue of Bonds (Refunding)" of principal amount equal to 24.81¢ per dollar of the principal amount of the bonds of the above mentioned company and districts owned and held by the above mentioned owners and holders. Each of said bonds shall be accompanied by all of its appurtenant coupons which have not heretofore been paid. [19] In the event any such unpaid coupons due prior to May 31, 1933, are missing, the principal amount of cash, or at District's option, refunding bonds to be delivered by the District shall be reduced in the amount of 20.50¢ for each dollar of the face amount of such missing coupons. In the event any such unpaid coupons due May 31, 1933 or subsequently, are missing, the face amount of such coupons will

be deducted from the face amount of such cash, or at District's option, refunding bonds to be delivered by the District.

The District also proposes and offers to deliver to the owner and holder of said $4,000.00 note cash, or at District's option, bonds of said District of said "Third Issue of Bonds (Refunding)" of principal amount equal to 25¢ per dollar of the principal amount of said note. The issuance of said "Third Issue of Bonds (Refunding)" was authorized by vote of the electors of said District at an election held on the 4th day of June, 1934, and by a resolution for the issuance and execution of such bonds adopted by said Board of Trustees at a meeting of said Board held on the 24th day of July, 1934, as amended, to which resolution reference is hereby made; said refunding bonds shall bear interest at the rate of four per cent (4%) per annum, payable semi-annually on January first and July first, shall be dated July 1, 1934, shall be payable in such funds as are on the respective dates of payment of the principal of and interest on said bonds made legal tender for debts due the United States of America, shall be payable at the office of the County Treasurer of Riverside County, in the County of Riverside, California, or at the National City Bank of New York in the Borough of Manhattan, City of New York, State of New York, at the option of the holder and shall be in thirty (30 series to mature annually from and including July 1, 1938, to and including July 1, 1967; said bonds and the coupons

thereon shall be in substantially the form set out in the resolution last mentioned and may be registerable at the option of the holder as to both principal and [20] interest; said District will provide that the schedule of maturities of said bonds set out in said last mentioned resolution shall be modified so as to provide bonds in such principal amounts as may be necessary to satisfy and comply with such final decree as may be made by the United States District Court in proceedings for the composition of indebtedness of said District under Chapter X of the National Bankruptcy Act.

The District shall also deliver to each and all of the owners and holders of any interest coupons detached from the above-mentioned bonds, cash, or at District's option, the bonds of said District of the "Third Issue of Bonds (Refunding)" of principal amount (a) equal to 20.50 cents for each dollar of face amount of any such detached coupons which came due prior to May 31, 1933, and (b) equal to the face amount of any such detached coupons due May 31, 1933, or subsequently.

The District will provide cash sufficient to pay to each owner and holder of bonds and coupons the difference between the sum of $100.00 (or nearest multiple thereof) and the principal amount of refunding bonds required hereunder to be delivered to such person, to the end that such cash and refunding bonds in the principal amount of $100.00 (or multiples thereof) shall be disbursed to such person. [21]

EXHIBIT "B"

LIST OF SECURITIES OWNED AND HELD BY RECONTRUCTION FINANCE CORPORATION,

whose address is 17th and "I" Streets, N. W., Washington, D. C. and which has accepted the plan of composition.

Description of Claims.

I.

Bonds of Palo Verde Mutual Water Company:

Amount $1,000.00 each.	
Nos. 243 to 380 inclusive,	$138,000.00
Amount $500.00 each.	
Nos. 491 to 530 inclusive,	20,000.00
Amount $100.00 each.	
Nos. 861 to 972 inclusive,	
" 974 " 980 "	11,900.00
Total,	$169,900.00

II.

Bonds of Palo Verde Joint Levee District of Riverside and Imperial Counties, California (First Issue):

Amount $1,000.00 each.

Nos. 353 to 354 inclusive
" 360
" 362
" 373 " 380 "
" 385 " 390 "
" 393 " 402 "
" 404 " 450 "
" 453 " 480 "
" 486 " 493 "
" 495 " 517 "
" 519 " 1106 "
" 1108 " 1132 "

" 1134 " 1138 "			
" 1141 " 1154 "			
" 1156 " 1170 "			
" 1174 " 1204 "			
" 1207 " 1234 "			
" 1238 " 1285 "			$886,000.00
Amount $951.86			
No. 1286			951.86
		Total	$886,951.86

[22]

III.

Bonds of Palo Verde Joint Levee District of Riverside and Imperial Counties, California (Second Issue):

Amount $1,000.00 each.

Nos. 66 to 70, inclusive		
" 73 " 105 "		
" 107 " 116 "		
" 121 " 138 "		
" 141 " 147 "		
" 152 " 175 "		
" 177 " 204 "		
" 206		
" 208 " 371 "		$290,000.00
Amount $378.50		
No. 372		378.50
	Total,	$290,378.50

IV.

Bonds of Palo Verde Drainage District:

Amount $500.00 each.

Nos. 1 to 418, inclusive		
" 423 " 464 "		
" 475 " 556 "		
" 562 " 563 "		
" 573 " 1565 "		
" 1567 " 1700 "		
	Total,	$835,500.00

[23]

V.

Bonds of Palo Verde Irrigation District (First Issue):

Amount $1,000.00 each.

Nos.	1	to	5,	inclusive
"	10	"	24	"
"	10	"	25	"
"	39	"	53	"
"	68	"	88	"
"	107	"	127	"
"	146	"	147	"
"	150	"	153	"
"	157	"	166	"
"	185	"	204	"
"	210	"	301	"
"	409	"	526	"
"	633	"	719	"
"	723	"	750	"
"	857	"	868	"
"	873	"	913	"
"	918	"	974	"
"	1081	"	1198	"
"	1305	"	1341	"
"	1352	"	1425	"
"	1534			
"	1537	"	1654	"
"	1763	"	1774	"
"	1780	"	1883	"
"	1992	"	2011	"
"	2017	"	2118	"
"	2234	"	2295	"
"	2306	"	2364	"
"	2484	"	2534	"
"	2540	"	2623	"
"	2752	"	2762	"
"	2764	"	2768	"
"	2774	"	2779	"
"	2785	"	2837	"
"	2839	"	2842	"
"	2848	"	2892	"
"	3020	"	3038	"

" 3040 " 3049 "
" 3051 " 3155 "

Total, $1,649,000.00

[24]

VI.

Bonds of Palo Verde Irrigation District (Second Issue):

Amount $1,000.00 each.

Nos. 1 to 17, inclusive
" 20 " 33 "
" 36 " 124 "
" 126 " 213 "

Total, $208,000.00

VII.

Promissory note of Palo Verde Irrigation District in favor of D. A. Foley & Co., in the principal amount of $4,000.00, together with certain interest thereon.

[25]

EXHIBIT "C"

LIST OF BONDHOLDERS WHO HAVE NOT ACCEPTED THE PLAN

I.

Holder		Description of Claim	
		Bond of Palo Verde Mutual Water Company	
Name	**Address**	**No.**	**Amount**
Unknown		973	$100.00

II.

Holder	Description of Claim
	Bond of Palo Verde Joint Levee District First Issue

Name	Address	No.	Amount
J. R. Mason	1920 Lake St., San Francisco, Calif.,	391	$ 1,000.00
" " "	" "	392	1,000.00
" " "	" "	403	1,000.00
J. H. Jordan	Riverside, Calif.	451	1,000.00
" " "	" "	452	1,000.00
" " "	" "	481	1,000.00
" " "	" "	482	1,000.00
" " "	" "	483	1,000.00
" " "	" "	484	1,000.00
" " "	" "	485	1,000.00
" " "	" "	494	1,000.00
" " "	" "	518	1,000.00
J. R. Mason	1920 Lake St., San Francisco, Calif.,	1107	1,000.00
J. H. Jordan	Riverside, Calif.,	1133	1,000.00
J. R. Mason	1920 Lake St., San Francisco, Calif.,	1139	1,000.00
" " "	" "	1140	1,000.00
J. H. Jordan	Riverside, Calif.,	1171	1,000.00
J. R. Mason	1920 Lake St., San Francisco, Calif.,	1172	1,000.00
" " "	" "	1173	1,000.00
" " "	" "	1205	1,000.00
" " "	" "	1206	1,000.00
" " "	" "	1235	1,000.00
" " "	" "	1236	1,000.00
" " "	" "	1237	1,000.00
Unknown		1155	1,000.00
		Total,	$25,000.00

[26]

III.

Holder		Description of Claim	
	Bond of Palo Verde Joint Levee District Second Issue		
Name	**Address**	**No.**	**Amount**
J. H. Jordan	Riverside, Calif.	106	$1,000.00
" " "	" "	117	1,000.00
" " "	" "	118	1,000.00
" " "	" "	119	1,000.00
" " "	" "	120	1,000.00
" " "	" "	139	1,000.00
" " "	" "	140	1,000.00
J. R. Mason	1920 Lake St., San Francisco, Calif.	176	1,000.00
Unknown		148	1,000.00
		149	1,000.00
		150	1,000.00
		151	1,000.00
		205	1,000.00
		207	1,000.00
		Total,	$14,000.00

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IV.

Holder		Description of Claim	
	Bond of Palo Verde Drainage District		
Name	**Address**	**No.**	**Amount**
J. H. Jordan	Riverside, Calif.,	419	500.00
" " "	" "	420	500.00
" " "	" "	421	500.00
" " "	" "	422	500.00
Andrew Riegel	676 Berendo St., Los Angeles, Calif.,	465	500.00
" "	" "	466	500.00
" "	" "	467	500.00
" "	" "	468	500.00

Name	Address	No.	Amount
" "	" "	469	500.00
" "	" "	470	500.00
" "	" "	471	500.00
" "	" "	472	500.00
" "	" "	473	500.00
" "	" "	474	500.00
J. H. Jordan	Riverside, Calif.	557	500.00
" " "	" "	558	500.00
1st National Bank	Tustin, Calif.,	559	500.00
" " "	" "	560	500.00
" " "	" "	561	500.00
" " "	" "	564	500.00
" " "	" "	565	500.00
" " "	" "	566	500.00
" " "	" "	567	500.00
" " "	" "	568	500.00
" " "	" "	569	500.00
" " "	" "	570	500.00
" " "	" "	571	500.00
" " "	" "	572	500.00
Edgerton State Bank or Farmer's Com'l. Bank	Edgerton, Ohio	1566	500.00
	Total,		$14,500.00

[28]

V.

Holder	Description of Claim
	Bond of Palo Verde Irrigation District First Issue

Name	Address	No.	Amount
Lottie Wright	5494 College Ave., Oakland, Calif.,	148	$1,000.00
" "	" "	149	1,000.00
J. R. Mason	1920 Lake St., San Francisco, Calif.,	154	1,000.00
" " "	" "	155	1,000.00
" " "	" "	156	1,000.00

Name	Address	No.	Amount
A. K. Busche	335 Adeline St., Oakland, Calif.	205	1,000.00
" " "	" "	206	1,000.00
" " "	" "	207	1,000.00
" " "	" "	208	1,000.00
" " "	" "	209	1,000.00
J. R. Mason	1920 Lake St., San Francisco, Calif.,	720	1,000.00
" " "	" "	721	1,000.00
" " "	" "	722	1,000.00
N. J. Cornwall	892 Arlington Ave., Berkeley, Calif.,	869	1,000.00
" " "	" "	870	1,000.00
" " "	" "	871	1,000.00
" " "	" "	872	1,000.00
L. F. Abadie	750 Warfield St., Oakland, Calif.,	914	1,000.00
" " "	" "	915	1,000.00
" " "	" "	916	1,000.00
" " "	" "	917	1,000.00
" " "	" "	1342	1,000.00
" " "	" "	1343	1,000.00
" " "	" "	1344	1,000.00
" " "	" "	1345	1,000.00
" " "	" "	1346	1,000.00
" " "	" "	1347	1,000.00
" " "	" "	1348	1,000.00
" " "	" "	1349	1,000.00
" " "	" "	1350	1,000.00
" " "	" "	1351	1,000.00
Charles F. Veysey	Riverside, Calif.,	1535	1,000.00
" " "	" "	1536	1,000.00
A. K. Busche	335 Adeline St., Oakland, Calif.,	1775	1,000.00
" " "	" "	1776	1,000.00
" " "	" "	1777	1,000.00
" " "	" "	1778	1,000.00
" " "	" "	1779	1,000.00

Name	Address	No.	Amount
J. R. Mason	1920 Lake St., San Francisco, Calif.,	2012	1,000.00
" " "	" "	2013	1,000.00
" " "	" "	2014	1,000.00
" " "	" "	2015	1,000.00
" " "	" "	2016	1,000.00

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Holder	Description of Claim
	Bond of Palo Verde Irrigation District First Issue

Name	Address	No.	Amount
Geo. F. Covell	Modesto, Calif.,	2296	$1,000.00
" " "	" "	2297	1,000.00
" " "	" "	2298	1,000.00
" " "	" "	2299	1,000.00
" " "	" "	2300	1,000.00
" " "	" "	2301	1,000.00
" " "	" "	2302	1,000.00
" " "	" "	2303	1,000.00
" " "	" "	2304	1,000.00
" " "	" "	2305	1,000.00
A. K. Busche	335 Adeline St., Oakland, Calif.,	2535	1,000.00
" " "	" "	2536	1,000.00
" " "	" "	2537	1,000.00
" " "	" "	2538	1,000.00
" " "	" "	2539	1,000.00
N. J. Cornwall	892 Arlington Ave., Berkeley, Calif.,	2763	1,000.00
A. K. Busche	335 Adeline St., Oakland, Calif.,	2769	1,000.00
" " "	" "	2770	1,000.00
" " "	" "	2771	1,000.00
" " "	" "	2772	1,000.00
" " "	" "	2773	1,000.00
J. W. Spofford	703 Market St., San Francisco, Calif.,	2838	1,000.00

Name	Address	No.	Amount
N. J. Cornwall	892 Arlington Ave., Berkeley, Calif.,	2843	1,000.00
" " "	" "	2844	1,000.00
" " "	" "	2845	1,000.00
" " "	" "	2846	1,000.00
" " "	" "	2847	1,000.00
Unknown		2780	1,000.00
"		2781	1,000.00
"		2782	1,000.00
"		2783	1,000.00
"		2784	1,000.00
"		3039	1,000.00
		Total,	$76,000.00

[30]

VI.

Holder	Description of Claim
	Bond of Palo Verde Irrigation District Second Issue

Name	Address	No.	Amount
J. R. Mason	1920 Lake St., San Francisco, Calif.,	18	$1,000.00
" " "	" "	19	1,000.00
Walter G. Muhe	201 Sansome St., San Francisco, Calif.,	34	1,000.00
" " "	" "	35	1,000.00
L. F. Abadie	750 Warfield St., Oakland, Calif.,	125	1,000.00
		Total,	$5,000.00

[31]

EXHIBIT "D"

CONDENSED SUMMARY

Issue	Holder	Amount	%
P. V. Mutual Water Co.,	R. F. C.	$169,900.00	99.94
	Others	100.00	0.06
	Total,	$170,000.00	100.00
P. V. Joint Levee Dist., (1st Issue)	R. F. C.	$886,951.86	97.26
	Others	25,000.00	2.74
	Total,	$911,951.86	100.00
P. V. Joint Levee Dist., (2nd Issue)	R. F. C.	$290,378.50	95.40
	Other	14,000.00	4.60
		$304,378.50	100.00
P. V. Drainage Dist.,	R. F. C.	$835,500.00	98.29
	Others	14,500.00	1.71
	Total,	$850,000.00	100.00
P. V. Irrigation Dist., (1st Issue)	R. F. C.	$1,649,000.00	95.59
	Others	76,000.00	4.41
	Total,	$1,725,000.00	100.00
P. V. Irrigation Dist., (2nd Issue)	R. F. C.	$208,000.00	97.65
	Others	5,000.00	2.35
	Total,	$213,000.00	100.00
Note	R. F. C.	$ 4,000.00	100.00
All Debts	R. F. C.	$4,043,730.36	96.76
		134,600.00	3.24
	Total,	$4,178,330.36	100.00

[32]

EXHIBIT "E"

RESOLUTION OF THE BOARD OF TRUSTEES OF PALO VERDE IRRIGATION DISTRICT AUTHORIZING THE INSTITUTION OF A PROCEEDING FOR COMPOSITION OF CERTAIN INDEBTEDNESS OF THE DISTRICT UNDER CHAPTER X OF THE NATIONAL BANKRUPTCY ACT.

Whereas, the territory within Palo Verde Irrigation District consists of lands used principally for agricultural purposes and said District owns and operates an irrigation system, a drainage system and a levee system used for the irrigation, reclamation and protection of said lands; and

Whereas, due to the general depression and adverse agricultural conditions existing throughout the United States for the past several years and the consequent low market value of farm products, the production of such products in said District has been without profit, the value thereof being often less than the cost of production, with the result that the owners of said lands have been, are and will be unable to pay to the District taxes levied upon such lands for the purpose of paying the District's indebtedness, as and when the installments of principal and interest thereon have matured or will mature; and

Whereas, by reason of such adverse agricultural conditions and accumulated delinquent taxes, the

value of the lands in said District has decreased until, were said lands to be required to pay said indebtedness, said lands for all practical purposes are and will be unmarketable; and

Whereas, the District, without success, has made due and diligent effort to collect the taxes so levied by it upon said lands and it has become apparent that, unless the outstanding indebtedness of the District were reduced and refinanced, the burden of the District taxes upon said lands would be greater than the value thereof; and [33]

Whereas, in an effort to relieve such condition, the District has applied to the Reconstruction Finance Corporation, an agency of the United States of America, for a loan of $1,039,423.00, and such loan has been authorized for the purpose of reducing and refinancing the outstanding indebtedness of the District, consisting of bonds in the principal amount of $4,174,330.36 and a certain promissory note in the sum of $4,000.00; and

Whereas, the basis or ratio for reducing and refinancing such indebtedness was 24.81 cents for each dollar of the principal amount of said bonds, exclusive of interest, and 25 cents for each dollar of the principal amount of said promissory note, which the District determined was fair and equitable both to the holders of its outstanding indebtedness and to the owners of the lands within the District, and its Board of Trustees has duly adopted a resolution accepting such proposed loan and agreeing to carry out the terms and conditions of the resolu-

tion of said Corporation and contracts evidencing the same; and

Whereas, the provisions of said constracts cannot be availed of by the District, nor can the District consummate such loan, without the consent of all holders of said indebtedness; and

Whereas, said Corporation owns and holds 96.74 per cent in amount of all said indebtedness and other persons own and hold the remaining 3.26 per cent thereof; and

Whereas, it appears to be necessary and desirable that the District file and prosecute, to final determination, a proceeding in the District Court of the United States, in and for the Southern District of California, Central Division, pursuant to the provisions of Chapter X of the National Bankruptcy Act, approved July 1, 1898, for the composition of all said indebtedness in accordance with the plan of composition hereinafter set forth; [34]

Now, Therefore, be it Resolved, by the Board of Trustees of said District, that said Board does hereby find, determine and declare that each and all of the matters and things recited in the preamble to this resolution are true and correct, and that the interests of said District require that a petition be filed with said District Court, in whose territorial jurisdiction said District is located, for the purpose of effecting, through the decree of said Court, such plan of composition, and for that purpose Messrs. Stewart, Shaw & Murphey, attorneys for said District, are hereby instructed to prepare and file such

petition and prosecute proceedings thereon to final decree and take all steps and proceedings in the premises necessary to protect and further the interests of said District, including the restraining of actions heretofore or hereafter brought against said District upon, or in relation to, obligations of said District, and Mr. R. A. Grant, President of said Board of Trustees is hereby instructed to sign and verify such petition on behalf of said District and take all other steps necessary or appropriate toward the prosecution of such petition to final decree, and the officers of said District are authorized to pay the filing fee of $100.00 required by said Act and such other expenses as may be necessary or proper in the premises; and

Be it Further Resolved that said Board does hereby find that the following plan of composition is fair, just and reasonable to the District and its creditors and does hereby declare and propose that such plan be submitted to said Court and to the creditors of said District for approval and effectuation through the decree of said Court.

(Here follows copy of plan of composition, Exhibit "A".)

[Endorsed]: Filed May 13, 1938. [35]

[Title of District Court and Cause.]

ORDER APPROVING PETITION AND FOR NOTICE.

Upon reading and filing the verified petition of Palo Verde Irrigation District for composition of debts and it appearing from said petition that said Palo Verde Irrigation District is an irrigation district located within the territorial jurisdiction of this Court and is qualified to file such a petition under Chapter X of the National Bankruptcy Act and the Court being satisfied that said petition complies with said Chapter X and has been filed in good faith and good cause appearing therefor,

Now, Therefore, it is Hereby Ordered:

(1). That said petition is approved as properly filed under said Chapter X; and

(2). That Monday, the 18th day of July, 1938, at the hour of 10 o'clock a. m. is hereby fixed as the time for a hearing to be held before said Court on said petition and the Court Room numbered Room 482 in the Pacific Electric Building, situated at the southeast corner of Sixth and Main Streets, in the City of Los Angeles, State of California, is hereby fixed as the place for such hearing; and

(3). That the form of the notice to be given respecting said hearing shall be substantially the form of which copy is attached to this order marked Exhibit "A" and by this reference made a part of this order, which said form of notice is hereby [36]

approved and found to be sufficient in form and substance, and the clerk of this Court is hereby directed to execute and issue such notice in substantially said form; and

(4). That said petitioner is hereby required to give notice to its creditors of said hearing in the following manner, to-wit:

(a) By publication of said notice, at least once a week for three successive weeks, in "The Los Angeles Daily Journal", a newspaper of general circulation printed and published in the City of Los Angeles, State of California, and within the jurisdiction of this Court, and in "Pacific Coast Edition, The Wall Street Journal", which the court finds to be a paper having a general circulation among bond dealers and bondholders, and in no other publication;

(b) By mailing a copy of said notice, postage prepaid, to each creditor of petitioner named in the petition, at the address of such creditor given in the petition, or, if no address is given in the petition for any creditor and the address of such creditor cannot, with reasonable diligence, be ascertained, then a copy of said notice shall be mailed, postage prepaid, to such creditor addressed to him in care of the Clerk of this court;

(c) All expense of giving notice as herein provided shall be paid by the petitioner and the notice shall be first published and the mailing of copies

thereof shall be completed at least sixty (60) days before the date hereinabove fixed for said hearing.

Dated this 13th day of May, 1938.

GEO. COSGRAVE,
Judge.

[37]

EXHIBIT "A"

NOTICE TO CREDITORS OF PALO VERDE IRRIGATION DISTRICT, INCLUDING HOLDERS OF BONDS OF PALO VERDE MUTUAL WATER COMPANY, PALO VERDE JOINT LEVEE DISTRICT OF RIVERSIDE AND IMPERIAL COUNTIES, CALIFORNIA, AND PALO VERDE DRAINAGE DISTRICT.

Notice is Hereby Given to all creditors of Palo Verde Irrigation District, an irrigation district organized and existing under and by virtue of the act of the Legislature of the State of California designated the "Palo Verde Irrigation District Act", and having its office at Blythe, California, including all holders of bonds issued or authorized by Palo Verde Mutual Water Company, a corporation, Palo Verde Joint Levee District of Riverside and Imperial Counties, California, a levee district, and Palo Verde Drainage District, a drainage district, which corporation, levee district and drainage district were organized under the laws of said state, as follows:

(1). That said Palo Verde Irrigation District has filed in the District Court of the United States, in and for the Southern District of California, Central Division, a Petition for composition of debts under Chapter X of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States", approved July 1, 1898, as amended, which petition states, among other things, that said District is unable to meet its debts as they mature and that it desires to effect a composition of its debts under the provisions of said Chapter X and said District has filed and submitted, attached to said petition and marked "Exhibit A", a proposed Plan of Composition of Debts and has alleged that the holder of more than ninety-six (96) per cent of the debts affected by said Plan has accepted said Plan in writing;

(2). That the debts of said Palo Verde Irrigation District affected by said Plan of Composition include only the following securities, to-wit: All outstanding and unpaid [38] bonds and coupons thereof heretofore issued or authorized by said District and by said Palo Verde Mutual Water Company, Palo Verde Joint Levee District of Riverside and Imperial Counties, California, and Palo Verde Drainage District and a certain $4,000.00 promissory note executed by said Palo Verde Irrigation District in favor of D. A. Foley and Company;

(3). That said plan of composition in general provides that said Palo Verde Irrigation District proposes to deliver to the owners and holders of said bonds, in exchange therefor, cash, or at said District's option, the bonds of said District of the "Third Issue of Bonds (Refunding)" of principal amount equal to 24.81¢ per dollar of the principal amount of said outstanding bonds, provided each such outstanding bond shall be accompanied by all appurtenant unpaid coupons, and certain deductions shall be made for missing coupons, and corresponding allowances made for detached coupons. Said District also proposes to deliver to the owner and holder of said $4,000.00 note, in exchange therefor, cash, or at District's option, the bonds of said refunding issue equal in principal amount to 25¢ per dollar of the principal amount of said note. For further details reference is made to said petition and said Exhibit "A".

(4). That said bonds of said refunding issue shall bear interest at the rate of 4% per annum, payable semi-annually, shall be payable at the office of the County Treasurer of Riverside County, California, or, at option of holder, at National City Bank of New York, in such funds as are on dates of payments legal tender for debts due the United States, shall mature serially each year from 1938 to 1967, inclusive, and may be registerable at option of holder as to principal and interest;

(5). That said petition has been approved by said Court as properly filed under said Chapter X and is now pending in said court;

(6). That a hearing will be held before said Court on [39] July 18, 1938, at the hour of 10 o'clock a. m., at the court room numbered 482, in the Pacific Electric Building situated at the southeast corner of Sixth and Main Streets, in the City of Los Angeles, State of California, for the purpose of considering said plan of composition and any changes or modifications thereof which may be proposed or decreed to be necessary or proper and for the further purpose of hearing any creditor controverting by answer any of the material allegations of said petition or setting up any objection he may have to said plan of composition;

(7). That at any time not less than ten (10) days prior to the time fixed for said hearing any creditor of said petitioner affected by said plan of composition may file an answer to said petition controverting any of the material allegations therein and setting up any objection he may have to said plan of composition;

(8). All creditors are required to file proof of their claims in writing by answer or other sworn written statement thereof in detail on or before the date fixed for said hearing.

By order of said United States District Court dated this .... day of May, 1938.

[Seal]

....

Clerk of the United States District Court.

By..

Deputy.

[Endorsed]: May 13, 1938. [40]

[Title of District Court and Cause.]

STIPULATION RELATING TO EVIDENCE AT HEARING ON MERITS OF PLAN.

It is Hereby Stipulated by and between petitioner above named and the respondents represented by their undersigned attorney as follows:

1. That a transcript containing all oral evidence introduced, all objections and rulings thereon and all stipulations made at the trial held in the Superior Court of the State of California, in and for the County of Riverside, November 17th to 23rd inclusive, 1937, in that certain matter then pending in said Superior Court entitled "In the Matter of the Application of Palo Verde Irrigation District, an irrigation district, for Readjustment of Debts", being case or matter No. 29147 upon the Civil Register of Actions of said Superior Court may be prepared and certified by the Official Reporter of said Superior Court.

2. That such transcript and all exhibits introduced in evidence or for identification in said matter in said Superior Court may be offered in evidence at the hearing on the merits of the petition herein and of the proposed plan of composition, to be held in the above entitled District Court, now set for July 18th, 1938, or at any continuance or continuances thereof, without production in Court of the witnesses who testified in said Superior Court and may be received in evidence with the same

effect as if said witnesses had testified in said District Court as their testimony appears in said transcript, subject to all proper exceptions and objections other than that the witnesses were not produced in court nor sworn nor testified orally. All stipulations made at said hearing in said [41] Superior Court shall be deemed made in said District Court.

3. That any of the parties hereto may introduce at said hearing set for July 18th, 1938, or continuance or continuances thereof, such additional evidence as they may be advised.

4. That no material change in the conditions affecting and relating to petitioner, its indebtedness, or the merits of the petition or the proposed plan of composition herein submitted, has occurred since the said hearing of November 17th to 23rd, 1937, inclusive, or will occur prior to July 18th, 1938, except that holders of certain of petitioner's bonds may have transferred or may transfer their respective bonds.

5. That at such hearing to be held in said District Court on July 18th, 1938, or any continuance or continuances thereof, the matter of the merits of said petition and plan of composition shall be submitted to said District Court for decision upon said transcript of oral evidence and stipulations, said exhibits, such additional evidence as the parties may desire to adduce, such objections, exceptions and contentions as the parties may desire to present and upon this stipulation.

Dated this 20th day of June, 1938.

STEWART, SHAW & MURPHEY,
By ARVIN B. SHAW, JR.,
Attorneys for Petitioner.
W. COBURN COOK,
Attorney for J. R. Mason, James H. Jordan and L. F. Abadie.

[Endorsed]: Filed June 28, 1938. [42]

[Title of District Court and Cause.]

PROOF OF CLAIM.

H. A. Mulligan, upon oath, says that he is Treasurer of the Reconstruction Finance Corporation, an agency of the United States Government, having its principal place of business in the City of Washington, District of Columbia, and that he is duly authorized to make this proof, and says that the Palo Verde Irrigation District of Blythe, in the State of California, which has heretofore filed a petition for the composition of its debts, was at and before the filing of the petition, and still is, indebted to Reconstruction Finance Corporation in the amount of Four Million Forty-Three Thousand Seven Hundred Thirty Dollars and Thirty-Six Cents ($4,043,730.36), consisting of a note executed by Palo Verde Irrigation District, dated February 1, 1930, due January 2, 1932, payable to D. A. Foley & Company for the sum of $4,000, and a portion of six issues of bonds of such District as follows:

Palo Verde Mutual Water Company
First Mortgage Six Per Cent Serial
Bonds—

Serial Numbers	Prin. Amount	Maturity Date	Total Amount
243/264	$1000	2/1/32	$22,000.00
265/267	"	2/1/33	3,000.00
268/272	"	"	5,000.00
273/286	"	"	14,000.00
287/308	"	2/1/34	22,000.00
309/319	"	2/1/35	11,000.00
320/326	"	"	7,000.00
327/330	"	"	4,000.00
331/380	"	2/1/36	50,000.00
491/500	500	2/1/32	5,000.00
501/502	"	2/1/33	1,000.00
503	"	"	500.00
504/508	"	"	2,500.00
509/510	"	"	1,000.00
511/517	"	2/1/34	3,500.00
518	"	"	500.00
519/520	"	"	1,000.00
521/530	"	2/1/35	5,000.00
861/889	100	2/1/32	2,900.00
891	"	2/1/33	100.00
892/901	"	"	1,000.00
902/904	"	"	300.00
905/920	"	"	1,600.00

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Serial Numbers	Prin. Amount	Maturity Date	Total Amount
921/939	100	2/1/34	1,900.00
940	"	"	100.00
941/950	"	"	1,000.00
951/972	"	2/1/35	2,200.00
974/980	"	"	700.00
890	"	2/1/32	100.00

Total Purchased......$169,900.00

Palo Verde Joint Levee District
of Riverside and Imperial Counties
6½% Bonds—First Issue

Serial Numbers	Prin. Amount	Maturity Date	Total Amount
353/354	$1000	5/1/30	$ 2,000.00
360	"	"	1,000.00
362	"	"	1,000.00
373	"	"	1,000.00
374/377	"	"	4,000.00
378	"	"	1,000.00
385/388	"	5/1/31	4,000.00
389/390	"	"	2,000.00
393	"	"	1,000.00
394/397	"	"	4,000.00
398/399	"	"	2,000.00
400/402	1000	5/1/31	3,000.00
404/405	"	"	2,000.00
406	"	"	1,000.00
407/410	"	"	4,000.00
411/416	"	"	6,000.00
417/448	"	5/1/32	32,000.00
449/450	"	5/1/33	2,000.00
453/480	"	"	28,000.00
486/493	"	5/1/34	8,000.00
495/512	"	"	18,000.00
513/517	"	5/1/35	5,000.00
519/544	"	"	26,000.00
545/576	"	5/1/36	32,000.00
577/578	"	5/1/37	2,000.00
584/585	"	"	2,000.00
586/608	"	"	23,000.00
579/583	"	"	5,000.00
609/640	"	5/1/38	32,000.00
641/672	"	5/1/39	32,000.00
673/704	"	5/1/40	32,000.00
705/736	"	5/1/41	32,000.00
737/768	"	5/1/42	32,000.00
769/800	"	5/1/43	32,000.00
801/832	"	5/1/44	32,000.00
833/864	"	5/1/45	32,000.00

Serial Numbers	Prin. Amount	Maturity Date	Total Amount
865/896	"	5/1/46	32,000.00
897/928	"	5/1/47	32,000.00
929/960	"	5/1/48	32,000.00
961/992	"	5/1/49	32,000.00
993/998	"	5/1/50	6,000.00
999/1024	"	"	26,000.00
1025/1056	"	5/1/51	32,000.00
1057/1088	"	5/1/52	32,000.00
1089/1106	"	5/1/53	18,000.00
1108/1120	"	"	13,000.00
1121/1132	"	5/1/54	12,000.00
1134/1138	"	"	5,000.00
1141/1152	"	"	12,000.00
1153/1154	"	5/1/55	2,000.00
1156/1170	"	"	15,000.00
1174/1184	"	"	11,000.00

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Serial Numbers	Prin. Amount	Maturity Date	Total Amount
1185/1204	$1000	5/1/56	20,000.00
1207/1216	"	"	10,000.00
1217/1234	"	5/1/57	18,000.00
1238/1248	"	"	11,000.00
1249/1285	"	5/1/58	37,000.00
1286	951.86	"	951.86

Total Purched......$886,951.86

Palo Verde Joint Levee District
of Riverside and Imperial Counties
6½% Bonds—Second Issue

Serial Numbers	Prin. Amount	Maturity Date	Total Amount
66/70	$1000	11/1/30	$ 5,000.00
73/75	"	11/1/31	3,000.00
76	"	"	1,000.00
77/79	"	"	3,000.00
80/81	"	"	2,000.00
82/86	"	11/1/32	5,000.00
87/93	"	"	7,000.00
94/102	"	11/1/33	9,000.00
103/105	"	11/1/34	3,000.00

Serial Numbers	Prin. Amount	Maturity Date	Total Amount
107/111	"	"	5,000.00
112/116	"	11/1/35	5,000.00
121/129	"	11/1/36	9,000.00
130/131	"	11/1/37	2,000.00
135/138	"	"	4,000.00
141/147	"	11/1/38	7,000.00
152/156	"	11/1/39	5,000.00
157/165	"	11/1/40	9,000.00
166/174	"	11/1/41	9,000.00
175	"	11/1/42	1,000.00
132/134	"	11/1/37	3,000.00
177/186	"	11/1/42	10,000.00
187/195	"	11/1/43	9,000.00
196/204	"	11/1/44	9,000.00
206	"	11/1/45	1,000.00
208/213	"	"	6,000.00
214/222	"	11/1/46	9,000.00
223/231	"	11/1/47	9,000.00
232/240	"	11/1/48	9,000.00
241/249	"	11/1/49	9,000.00
250/258	"	11/1/50	9,000.00
259/267	"	11/1/51	9,000.00
268/279	"	11/1/52	12,000.00
280/288	"	11/1/53	9,000.00
289/292	"	11/1/54	4,000.00
293	"	"	1,000.00
294/297	"	"	4,000.00
298/306	"	11/1/55	9,000.00
307/315	"	11/1/56	9,000.00
316/324	"	11/1/57	9,000.00
325	"	11/1/58	1,000.00
326/333	"	"	8,000.00
334/342	"	11/1/59	9,000.00
343/351	"	11/1/60	9,000.00
352/360	"	11/1/61	9,000.00
361/371	"	11/1/62	11,000.00
372	378.50	"	378.50

Total Purchased......$290,378.50

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Palo Verde Drainage District, First Issue
6% Bonds

Serial Numbers	Prin. Amount	Maturity Date	Total Amount
1/15	$ 500.00	1/1/33	$ 7,500.00
16/17	"	"	1,000.00
18	"	"	500.00
19	"	"	500.00
20/80	"	"	30,500.00
81	"	"	500.00
82	"	"	500.00
83/85	"	"	1,500.00
86/187	"	1/1/34	51,000.00
188/306	"	1/1/35	59,500.00
307/341	"	1/1/36	17,500.00
342/343	"	"	1,000.00
346/358	"	"	6,500.00
359	"	"	500.00
360/378	"	"	9,500.00
344/345	"	"	1,000.00
379/384	"	"	3,000.00
385/394	"	"	5,000.00
395/407	"	"	6,500.00
408/418	"	"	5,500.00
423/442	"	"	10,000.00
443/464	"	1/1/37	11,000.00
475/556	"	"	41,000.00
562/563	"	"	1,000.00
573	"	"	500.00
574/595	"	"	11,000.00
596/685	"	1/1/38	45,000.00
686/695	"	"	5,000.00
696/728	"	"	16,500.00
729	"	"	500.00
730/765	"	"	18,000.00
766/952	"	1/1/39	93,500.00
953/1173	"	1/1/40	110,500.00
1174/1251	"	1/1/41	39,000.00
1252/1255	"	"	2,000.00
1256/1259	"	"	2,000.00
1260	"	"	500.00

Serial Numbers	Prin. Amount	Maturity Date	Total Amount
1261/1428	"	"	84,000.00
1429/1524	"	1/1/42	48,000.00
1525/1544	"	"	10,000.00
1545/1565	"	"	10,500.00
1567/1700	"	"	67,000.00

Total Purchased......$835,500.00

Palo Verde Irrigation District, First Issue, 6%.

Serial Numbers	Prin. Amount	Maturity Date	Total Amount
1/5	$1000	7/1/37	$ 5,000.00
10/24	"	7/1/38	15,000.00
39/47	"	7/1/39	9,000.00
48	"	"	1,000.00
49/53	"	"	5,000.00
68/73	"	7/1/40	6,000.00
74/78	"	"	5,000.00
79/88	"	"	10,000.00
107/127	"	7/1/41	21,000.00
146/147	"	7/1/42	2,000.00
150/153	"	"	4,000.00
157/166	"	"	10,000.00
185/189	"	7/1/43	5,000.00

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Serial Numbers	Prin. Amount	Maturity Date	Total Amount
190/197	$1000	7/1/43	8,000.00
198/204	"	"	7,000.00
210/301	"	"	92,000.00
409/425	"	7/1/44	17,000.00
431/455	"	"	25,000.00
456/526	"	"	71,000.00
426/430	"	"	5,000.00
633/634	"	7/1/45	2,000.00
635/639	"	"	5,000.00
640/672	"	"	33,000.00
673/703	"	"	31,000.00
704	"	"	1,000.00
705/719	"	"	15,000.00

Serial Numbers	Prin. Amount	Maturity Date	Total Amount
723/750	"	"	28,000.00
857/868	"	7/1/46	12,000.00
873/913	"	"	41,000.00
918/974	"	"	57,000.00
1081/1158	"	7/1/47	78,000.00
1161/1198	"	"	38,000.00
1305/1341	"	7/1/48	37,000.00
1352/1425	"	"	74,000.00
1534	"	7/1/49	1,000.00
1537/1654	"	"	118,000.00
1763/1774	"	7/1/50	12,000.00
1780/1883	"	"	104,000.00
1992/2011	"	7/1/51	20,000.00
2017/2118	"	"	102,000.00
2234/2295	"	7/1/52	62,000.00
2306/2364	"	"	59,000.00
2484/2534	"	7/1/53	51,000.00
2540/2623	"	7/1/53	84,000.00
2752/2762	"	7/1/54	11,000.00
2764/2768	"	"	5,000.00
2774/2779	"	"	6,000.00
2785/2837	"	"	53,000.00
2839/2842	"	"	4,000.00
2848/2867	"	"	20,000.00
2868/2869	"	"	2,000.00
2870/2892	"	"	23,000.00
3020/3038	"	7/1/55	19,000.00
3040/3044	"	"	5,000.00
3045/3046	"	"	2,000.00
3047/3048	"	"	2,000.00
3049	"	"	1,000.00
3050	"	"	1,000.00
3051/3155	"	"	105,000.00
1159/1160	"	7/1/47	2,000.00

Total Purchased......$1,649,000.00

Palo Verde Irrigation District, Second Issue Bonds

Serial Numbers	Prin. Amount	Maturity Date	Total Amount
1/11	$1000	7/1/37	$11,000.00
12/17	"	7/1/38	6,000.00
20/22	"	"	3,000.00
23/33	"	7/1/39	11,000.00
36/44	"	7/1/40	9,000.00
45/55	"	7/1/41	11,000.00
56/66	"	7/1/42	11,000.00
67/77	"	7/1/43	11,000.00
78/88	"	7/1/44	11,000.00
89/99	"	7/1/45	11,000.00
100/110	"	7/1/46	11,000.00
111/121	"	7/1/47	11,000.00
			[47]
122/124	"	7/1/48	3,000.00
126/132	"	"	7,000.00
133/143	"	7/1/49	11,000.00
144/154	"	7/1/50	11,000.00
155/165	"	7/1/51	11,000.00
166/177	"	7/1/52	12,000.00
178/189	"	7/1/53	12,000.00
190/201	"	7/1/54	12,000.00
202/213	"	7/1/55	12,000.00
		Total Purched	$208,000.00

Total bonds held by RFC $4,039,730.36

Note executed by Palo Verde Irrigation District, dated February 1, 1930, due January 2, 1932, payable to D. A. Foley & Company 4,000.00

Total Securities held by RFC $4,043,730.36

That no part of the debt has been paid and that there are no set-offs or counter-claims to the same; and that said Corporation has not, nor has any person by its order, or to the knowledge or belief

of this deponent, for its use, had or received any manner of security for said debt whatever.

H. A. MUNYER,
Treasurer,
Reconstruction Finance Corporation.

Subscribed and sworn to before me this 7th day of June, 1938.

[Notarial Seal] MARTHA LAFITTE RAY,
Notary Public

My commission expires July 15, 1941.

[Endorsed]: Filed June 29, 1938.

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[Title of District Court and Cause.]

ANSWER AND OBJECTIONS TO PETITION FOR COMPOSITION OF DEBTS

Comes now the respondents James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin, a corporation, creditors of petitioner Palo Verde Irrigation District, and by way of answer and objections to the petition for composition of debts, and without consenting thereto, admit, deny and allege:

I.

That respondents, and each of them, are creditors of the Palo Verde Irrigation District, in that they are severally the owners of certain bonds of

the Palo Verde Irrigation and/or Palo Verde Joint Levee District of Riverside and Imperial Counties, California, and/or Palo Verde Drainage District, in the principal amounts hereinafter set forth, together with interest coupons originally attached to said bonds representing unpaid interest and/or of coupons detached from bonds of said district, all as hereinafter described, and that said bonds and interest coupons so owned by said respondents are among the securities which the petitioner describes or refers to in said petition as affected by the plan of composition of debts, and that said bonds and coupons are unpaid and outstanding, and will be materially and adversely affected by the plan of composition of debts proposed by petition in these proceedings.

That the respondent James H. Jordan is the owner of bonds of the Palo Verde Joint Levee District of Riverside and Imperial [49] Counties in the sum of $18,000.00, bearing interest at 6½% per annum payable semi-annually and evidenced by interest coupons. That respondent is the owner of certain interest coupons of said levee district maturing May 1, 1930 and subsequently which are wholly unpaid. That the respondent James H. Jordan is the owner of bonds of the Palo Verde Drainage District in the sum of $3,000.00, bearing interest at 6% per annum payable semi-annually and evidenced by interest coupons. That said respondent is the owner of certain interest coupons of said

drainage district maturing July 1, 1930 and subsequently which are wholly unpaid.

That respondent J. R. Mason is the owner of $13,000.00 of bonds of the Palo Verde Irrigation District, together with unpaid interest coupons due semi-annually commencing with the year 1930, and for each subsequent year thereafter, said interest coupons representing interest upon said bonds at the rate of 6% per annum. That said respondent is also the owner of $14,000.00 of bonds of the Palo Verde Joint Levee District of Riverside and Imperial Counties, California, bearing interest at 6½% per annum, together with unpaid interest coupons due semi-annually commencing with the years 1930 and 1931, and for each year thereafter.

That respondent L. F. Abadie is the owner of $15,000.00 of bonds of the Palo Verde Irrigation District, bearing interest at 6% per annum, together with unpaid interest coupons due semi-annually commencing with the year 1930, and for each year thereafter.

That respondent George F. Covell is the owner of $10,000.00 of bonds of the Palo Verde Irrigation District, bearing interest at 6% per annum, together with unpaid interest coupons due semi-annually commencing with the year 1930, and for each year thereafter.

That respondent First National Bank of Tustin is the owner [50] of $6,000.00 of bonds of the Palo Verde Drainage District, bearing interest at 6% per annum, together with unpaid interest coupons

due semi-annually commencing with the year 1930, and for each year thereafter.

That the bonds and interest coupons held as aforesaid by said respondents, and each of them, will be more particularly set forth in proofs of claims filed in the above-entitled proceedings.

That respondents, and each of them, under and by virtue of the bonds and interest coupons owned and held by them and hereinbefore described, are creditors of the Palo Verde Irrigation District.

II.

Said respondents deny that petitioner is unable to meet its obligations as they mature, and in that connection respondents are informed and believe, and upon such information and belief allege that 96% or thereabouts of the obligations alleged in said petition have been paid with funds obtained from or furnished by Reconstruction Finance Corporation, and that by a contract, or by contracts, duly made and executed between *petition* and Reconstruction Finance Corporation the petitioner is obligated to Reconstruction Finance Corporation in an amount equal to 24.81% or thereabouts of 96% of the total obligations alleged in said petition, or in a total sum of $966,000.00 or thereabouts, together with interest thereon at the rate of 4% per annum, payable semi-annually, and no more, and that with which amount so loaned or advanced by Reconstruction Finance Corporation, more than $4,000,000.00 of the principal obligations of *petition*

alleged in said petition, with approximately $1,500,-000.00 in interest coupons attached to the bonds representing the same, has in legal effect been extinguished. [51]

III.

That respondents have no information or belief sufficient to enable them to answer paragraphs XVIII and XXII of said petition, and placing their denial on that ground, deny each and every allegation of said paragraphs.

IV.

Respondents deny the allegations of paragraph XXI of said petition, and deny that said plan of composition is fair, equitable, or for the best interests of petitioner's creditors, and deny that said plan does not discriminate unfairly in favor of any creditor or class of creditors. Respondents allege that said plan discriminates unfairly in favor of the Reconstruction Finance Corporation.

V.

Respondents deny that there have been adverse agricultural conditions in the Palo Verde Valley, and deny that the market value of farm products produced within said valley has been less than the cost of production; deny that farming operations therein have been unprofitable; deny that petitioner in good faith levied taxes to pay its bonded indebtedness and operating expenses from 1927 to 1932, and deny that taxes were greater than the ability of

the land to produce or of the farmers to pay, and deny that petitioner is or will continue to be unable to collect sufficient taxes to pay its obligations.

VI.

Referring to the allegations of paragraph XV of said petition, respondents allege that the plan therein mentioned was prepared and substantially completed and executed several years before the commencement of this proceeding, and that said plan is not a plan of composition pursuant to the act under which this proceeding is taken. [52]

VII.

As to paragraph XVI of said petition, respondents allege that the only persons or parties affected by the plan therein mentioned are certain owners and holders of bonds and interest coupons which the Palo Verde Irrigation District is obligated to pay, including the respondents, who have not consented nor agreed to said plan.

VIII.

Deny that Reconstruction Finance Corporation, an agency of the United States of America, or otherwise, owns and holds not less than 51% in amount, viz., more than 96% in amount, of indebtedness affected by said plan of composition, and respondents deny that said Reconstruction Finance Corporation owns or holds any other principal amount of all or any of the indebtedness affected by said alleged plan of composition. Respondents deny that said corporation owns said promissory note

alleged in the petition and/or not less than 51% in amount, viz., more than 95% in amount, or any other percent, of any of the issues of bonds or interest coupons alleged in said petition, and deny that said corporation owns the list of indebtedness set out in Exhibit "B" attached to said petition, or any part thereof.

IX.

As to paragraph XVIII of said petition, respondents allege that said Reconstruction Finance Corporation accepted the plan of composition therein referred to several years ago, and that under the terms of California Statutes of 1937, Chapter 4, Section 19, said Reconstruction Finance Corporation and petitioner were bound by said plan of composition prior to the commencement of this proceeding and thereby said corporation is not affected by the plan referred to in this proceeding.

X.

Respondents deny that the outstanding and unpaid obligations [53] of petitioner are of one class, and respondents allege that each bond issue of petitioner or on which petitioner is obligated is of a distinct and seperate class, and further allege that each bond and each interest coupon, when presented for payment, is of a distinct and separate class.

XI.

Respondents admit the allegations of paragraph III of said petition, except to the extent that Cali-

fornia Statutes of 1923, page 1067, may be contrary to the allegations of said paragraph.

Separate Defenses

As a further and separate defense these answering respondents allege that the said plan of composition proposed in said petition is inequitable, unjust and unfair to these respondents in that it proposes to force respondents to surrender and deliver up their bonds and interest coupons for a small fraction of the face value thereof, and without any other consideration therefor, while at the same time the petitioner, by the exercise of reasonable diligence, is and will be financially able to pay the obligations so owned by respondents in full and according to their terms.

And as a further and separate and distinct defense to said petition, respondents allege that heretofore and prior to the commencement of this proceeding the petitioner filed its certain petition in bankruptcy, in this Court, under the provisions of Chapter IX of the Bankruptcy Act of the United States, and set up in said petition identically the same plan of composition proposed in this proceeding, and alleged that the same creditors were affected by the plan of composition and in every way and to every legal effect alleged the same facts that are alleged in this proceeding and prayed for the enforcement of identically [54] the same plan of composition. That the force and effect and provisions of Chapter X of the Bankruptcy Act,

under which the present proceeding is brought, are substantially the same as those embodied and contemplated in Chapter IX of the Bankruptcy Act. That on or about Dec. 8, 1936 the judgment of the District Court of the United States for the Soutern District of California, in which said former proceeding was brought, was duly rendered, given, made, and entered, against petitioner, dismissing said proceeding. That said judgment became final and by force and effect thereof all of the matters alleged and set forth in the present petition are res adjudicata, and the Court herein is without power or jurisdiction to consider or adjudicate any of said matters in this proceeding.

And as a further and separate defense to said petition, respondents allege that on or about April 20, 1937, the petitioner filed a petition in the Superior Court of the State of California, in and for the County of Riverside, under the provisions of California Statutes of 1937, Chapter 4, for the purpose of enforcing and consummating, in proceedings in the nature of bankruptcy proceedings, identically the same plan of composition alleged and set forth in the present proceeding. That said Superior Court, after submission of the cause, ordered that an interlocutory judgment be entered in favor of said petitioner, Palo Verde Irrigation District, confirming said plan of composition. That subsequent thereto, said petitioner attempted to dismiss said proceeding in said Superior Court, and said Superior Court has or is about to enter an order

dismissing said cause, and from which these answering respondents have appealed or are about to appeal. That said cause and proceeding is pending in said Superior Court and involves identically the same matters and facts alleged in the petition in this proceeding. That under the provisions of [55] said California Statutes of 1937, Chapter 4, and of Section 19 of said chapter, the plan of composition sought to be enforced in that proceeding and in the present proceeding became binding upon and as to to the petitioner, Palo Verde Irrigation District, and the Reconstruction Finance Corporation, and became binding upon said parties prior to the commencement of this proceeding, and said Reconstruction Finance Corporation is not a creditor affected by this proceeding nor by the alleged plan of composition herein.

And as a further and separate answer and defense to said petition, respondents allege that, as shown by the petition herein and by this answer and by the statutes of California and in particular by California Statutes of 1923, page 1067, some of the bonds and interest coupons owned and held by respondents as aforesaid and some of the outstanding obligations of Palo Verde Irrigation District are obligations of the Palo Verde Drainage District and some are obligations of the County of Riverside, California, and some are obligations of the Palo Verde Joint Levee District of Riverside and Imperial Counties, though all of said obligations are also obligations of the petitioner, Palo Verde Ir-

rigation District. That this Court is without power of jurisdiction to consider or allow or approve any plan of composition or proceeding involving or affecting any of the said obligations of the Palo Verde Drainage District, or of the County of Riverside, California, or of the Palo Verde Joint Levee District of Riverside and Imperial Counties.

And as a further and separate defense to said petition and proceeding, respondents allege that Palo Verde Irrigation District is a subdivision and governmental agency of the State of California and neither it nor its obligations are subject or [56] amenable to the bankruptcy power of the Congress of the United States. That the State of California has not consent, nor can it consent, to this proceeding by the Palo Verde Irrigation District, nor to any proceeding by petitioner in bankruptcy or for composition of debts. That any purported consent of the State of California to this proceeding under the terms and provisions of California Statutes of 1934 (Ex. Sess.), Chapter 4, is unconstitutional and void in that said chapter violates the provisions of Article I, Section 16; Article IV, Section 1; Article X, Section 5, and Article XIII, Section 6, of the Constitution of the State of California, and Article I, Section 10 of the Constitution of the United States, and is otherwise unconstituional and void.

And for a further and separate defense respondents allege that Chapter X of the Bankruptcy Act of the United States is unconstitutional and void in that it violates Article I, Section 10, Clause 1,

and the Fifth and Tenth Amendments, of the Constitution of the United States.

And for a further and separate defense and cause of objection, respondents allege that respondent James H. Jordan on March 12, 1935, obtained a judgment in the Superior Court of Riverside County, California, against the Palo Verde Joint Levee District of Riverside and Imperial Counties, for the sum of $11,380.00, and in which said cause said respondent on March 17, 1937, obtained judgment against the Palo Verde Irrigation District for $11,380.00; and the respondent First National Bank of Tustin holds judgment against the Palo Verde Drainage District and the Palo Verde Irrigation District for the sum of $1440.00; and that all of the said judgments are unsatisfied. That each of the respondents have actions pending against the said various debtors [57] upon the unpaid portions of their claims, and wherein they are severally entitled to judgment except for the restraining order issued herein in this proceeding, and that said judgments and said causes of action are not provided for nor subject to composition herein.

Wherefore, said respondents pray that they be hence dismissed with their costs.

W. COBURN COOK,
Attorney for Respondents.

[58]

State of California
County of Stanislaus—ss.

J. R. Mason, being duly sworn, deposes and says: That he is one of the respondents named in the foregoing answer and is one of the answering respondents therein; that he has read said answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

J. R. MASON.

Subscribed and sworn to before me this 5th day of July, 1938.

[Seal] GILBERT MOODY.

Notary Public in and for the County of Stanislaus, State of California. [59]

(Title of District Court and Cause.)

AFFIDAVIT OF SERVICE BY MAIL

State of California
County of Stanislaus—ss.

W. Coburn Cook, being duly sworn, says:

That he is a citizen of the United States, over the age of twenty-one years and not a party to nor interested in the above entitled matter; that on the 5th day of July, 1938, he placed a full, true and correct copy of the annexed Answer and Objections to Petition for Composition of Debts, in an envelope, duly sealed, and deposited the same in the United States Post Office at Turlock, California,

with postage thereon fully prepaid, addressed to Stewart, Shaw & Murphey, Rowan Building, Los Angeles, California; that there is a regular daily communication by mail between Los Angeles and Turlock, California.

W. COBURN COOK.

Subscribed and sworn to before me this 5th day of July, 1938.

[Seal] GILBERT MOODY.

Notary Public in and for the County of Stanislaus, State of California.

[Endorsed]: Filed July 6, 1938.

[60]

(Title of District Court and Cause.)

PROOF OF CLAIM

State of California
County of Alameda—ss.

L. F. Abadie, being first duly sworn, says:

That he is a creditor of Palo Verde Irrigation District, the petitioner herein, and that he is the owner and holder of the following described bonds and coupons of said irrigation district, to-wit:

That said L. F. Abadie is the owner of bonds in the principal amount of $15,000.00, which said bonds bear the numbers hereinafter indicated, and are in the several amounts as indicated and will mature at the date indicated; that each of said bonds bear interest at the rate of 6% per annum, evidenced by

interest coupons payable on January 1st and July 1st of each year; that said L. F. Abadie is the owner and holder of all the coupons attached to said bonds, of which coupons in the amount of $7650.00 have matured and were presented to the treasurer for payment, as hereinbelow indicated, and bearing interest at the rate of 7% per annum from dates of presentation, and that interest will continue to accumulate both by way of maturing coupons at 6% per annum and by way of interest at 7% per annum on presented bonds and coupons until payment has been made; that there are no counterclaims or offsets to same. That a particular description of said claim is as follows: [61]

BONDS

Bond No.	Amount	Date Due
125	$1000.00	July 1, 1948
914	1000.00	July 1, 1946
915	1000.00	" " "
916	1000.00	" " "
917	1000.00	" " "
1342	1000.00	July 1, 1948
1343	1000.00	" " "
1344	1000.00	" " "
1345	1000.00	" " "
1346	1000.00	" " "
1347	1000.00	" " "
1348	1000.00	" " "
1349	1000.00	" " "
1350	1000.00	" " "
1351	1000.00	" " "

Total bonds: $15,000.00.

COUPONS

No. of Coupons	Am't each Coupon	Date Due	Date Presented			Total
15	$30.00	July 1, 1930	July		1930	$450.00
15	30.00	Jan. 1, 1931	Jan.		1931	450.00
15	30.00	July 1, 1931	July		1931	450.00
15	30.00	Jan. 1, 1932	Jan.		1932	450.00
15	30.00	July 1, 1932	July		1932	450.00
15	30.00	Jan. 1, 1933	Jan.		1933	450.00
15	30.00	July 1, 1933	July		1933	450.00
15	30.00	Jan. 1, 1934	Jan.		1934	450.00
15	30.00	July 1, 1934	June	25,	1936	450.00
15	30.00	Jan. 1, 1935	"	"	"	450.00
15	30.00	July 1, 1935	"	"	"	450.00
15	30.00	Jan. 1, 1936	"	"	"	450.00
15	30.00	July 1, 1936	July	21,	1936	450.00
15	30.00	Jan. 1, 1937	Jan.	6,	1937	450.00
15	30.00	July 1, 1937	July	2,	1937	450.00
15	30.00	Jan. 1, 1938	Jan.	3,	1938	450.00
15	30.00	July 1, 1938				450.00

Total Coupons: $7650.00.

This claim includes interest at 7% per annum on each amount of bond principal and interest which has matured or will hereafter mature, from the respective dates of presentation to the treasurer of the district.

L. F. ABADIE.

Subscribed and sworn to before me this 11th day of July, 1938.

[Seal] CHAS. T. COX.

Notary Public in and for the County of Alameda, State of California.

My Commission Expires Sept. 20, 1937.

[Endorsed]: Filed July 13, 1938. [62]

(Title of District Court and Cause.)

PROOF OF CLAIM

State of California
County of Orange—ss.

C. A. Vance, being first duly sworn, says:

That he is an officer, to-wit: President of First National Bank of Tustin, California; that said First National Bank of Tustin, California, is a creditor of Palo Verde Irrigation District, the petitioner herein, and that it is the owner and holder of the following described bonds and coupons of said irrigation district, or on which said irrigation district is obligated for payment, to-wit:

That First National Bank of Tustin, California, is the owner of bonds of Palo Verde Drainage District in the principal amount of $6000.00, which said bonds bear the numbers hereinafter indicated, and are in the several amounts as indicated and will mature at the date indicated; that each of said bonds bear interest at the rate of 6% per annum, evidenced by interest coupons payable on January 1st and July 1st of each year; that said First National Bank of Tustin, California, is the owner and holder of all the coupons attached to said bonds, of which coupons in the amount of $2520.00 have matured and were presented to the treasurer for payment, as hereinbelow indicated, and bearing interest at the rate of 7% per annum from dates of presentation, and that interest will continue to accumulate both by way of maturing coupons at 6% per annum

and by way of interest at 7% per annum on presented bonds [63] and coupons until payment has been made; that there are no counterclaims or offsets to same. That a particular description of said claim is as follows:

BONDS

Bond No.	Amount	Date Due
559	$500.00	Jan. 1, 1937
560	500.00	" " "
561	500.00	" " "
564	500.00	" " "
565	500.00	" " "
566	500.00	" " "
567	500.00	" " "
568	500.00	" " "
569	500.00	" " "
570	500.00	" " "
571	500.00	" " "
572	500.00	" " "

Total Bonds: $6000.00.

COUPONS

No. of Coupons	Am't each Coupon	Date Due	Date Presented	Total
12	$15.00	July 1, 1930		$180.00
12	15.00	Jan. 1, 1931		180.00
12	15.00	July 1, 1931		180.00
12	15.00	Jan. 1, 1932		180.00
12	15.00	July 1, 1932		180.00
12	15.00	Jan. 1, 1933		180.00
12	15.00	July 1, 1933		180.00
12	15.00	Jan. 1, 1934		180.00
				$1440.00

That said creditor on March 17, 1937, recovered judgment against the Palo Verde Irrigation District on the foregoing coupons in the sum of $1440.00

and $9.25 costs; that said judgment was recovered in the Superior Court of Riverside County, California, in action No. 25588, entitled "First National Bank of Tustin, California, Plaintiff, vs. Palo Verde Irrigation District and Palo Verde Drainage District, Defendants".

No. of Coupons	Am't each Coupon	Date Due	Date Presented	Total
12	$15.00	July 1, 1934		$180.00
12	15.00	Jan. 1, 1935		180.00
12	15.00	July 1, 1935		180.00
12	15.00	Jan. 1, 1936		180.00
12	15.00	July 1, 1936		180.00
12	15.00	Jan. 1, 1937		180.00
				$1080.00

Total Coupons: $2520.00.

[64]

This claim includes interest at 7% per annum on each amount of bond principal and interest which has matured or will hereafter mature, from the respective dates of presentation to the treasurer of the district.

C. A. VANCE.

Subscribed and sworn to before me this 11th day of July, 1938.

[Seal] KATHRYN BUXTON,
Notary Public in and for the County of Orange, State of California.

[Endorsed]: Filed July 14, 1938. [65]

(Title of District Court and Cause.)

PROOF OF CLAIM

State of California
County of Stanislaus—ss.

J. R. Mason, being first duly sworn, says:

That he is a creditor of Palo Verde Irrigation District, the petitioner herein, and that he is the owner and holder of the following described bonds and coupons of said irrigation district, or on which said irrigation district is obligated for payment, to-wit:

That said J. R. Mason is the owner of bonds in the principal amount of $27,000.00, $13,000.00 of which are Palo Verde Irrigation District bonds and $14,000.00 are Palo Verde Joint Levee District of Riverside and Imperial Counties, California, bonds, which said bonds bear the numbers hereinafter indicated, and are in the several amounts as indicated and will mature at the date indicated; that each of said bonds of Palo Verde Irrigation District bear interest at the rate of 6% per annum, evidenced by interest coupons payable on January 1st and July 1st of each year, and that each of said bonds of the Palo Verde Joint Levee District of Riverside and Imperial Counties, California, bear interest at the rate of 6½% per annum, evidenced by interest coupons payable on May 1st and November 1st of each year; that said J. R. Mason is the owner and holder of all of the coupons attached to all of said bonds, of which coupons in the amount of $12,480.00 have

matured [66] and were presented to the treasurer for payment, as hereinbelow indicated, and bearing interest at the rate of 7% per annum from dates of presentation, and that interest will continue to accumulate both by way of maturing coupons at 6% per annum on the Palo Verde Irrigation District bonds and at 6½% per annum on the Palo Verde Joint Levee District of Riverside and Imperial Counties, California, bonds, and by way of interest at 7% per annum on presented bonds and coupons until payment has been made; that there are no counter-claims or off-sets to same. That a particular description of said claim is as follows:

Bonds of Palo Verde Irrigation District

Bond No.	Amount	Date Due
18	$1000.00	July 1, 1938
19	1000.00	July 1, 1938
154	1000.00	July 1, 1942
155	1000.00	July 1, 1942
156	1000.00	July 1, 1942
720	1000.00	July 1, 1945
721	1000.00	July 1, 1945
722	1000.00	July 1, 1945
2012	1000.00	July 1, 1951
2013	1000.00	July 1, 1951
2014	1000.00	July 1, 1951
2015	1000.00	July 1, 1951
2016	1000.00	July 1, 1951

Total Bonds: $13,000.00.

Coupons on Palo Verde Irrigation District Bonds

No. of Coupons	Am't each Coupon	Date Due	Date Presented	Total
13	$30.00	July 1, 1930		390.00
13	30.00	Jan. 1, 1931		390.00
13	30.00	July 1, 1931		390.00
13	30.00	Jan. 1, 1932		390.00
13	30.00	July 1, 1932		390.00
13	30.00	Jan. 1, 1933		390.00
13	30.00	July 1, 1933		390.00
13	30.00	Jan. 1, 1934		390.00
13	30.00	July 1, 1934		390.00
13	30.00	Jan. 1, 1935		390.00
13	30.00	July 1, 1935		390.00
13	30.00	Jan. 1, 1936		390.00
13	30.00	July 1, 1936		390.00
13	30.00	Jan. 1, 1937		390.00
13	30.00	July 1, 1937		390.00
13	30.00	Jan. 1, 1938		390.00
13	30.00	July 1, 1938		390.00

Total Coupons: $6630.00.

[67]

Bonds of Palo Verde Joint Levee District of Riverside and Imperial Counties, California

Bond No.	Issue	Amount	Date Due
391	1st	$1000.00	May 1, 1931
392	"	1000.00	" " "
403	"	1000.00	" " "
176	2nd	1000.00	Nov. 1, 1942
1107	1st	1000.00	May 1, 1953
1139	"	1000.00	" ", 1954
1140	"	1000.00	" " "
1172	"	1000.00	" ", 1955
1173	"	1000.00	" ", "
1205	"	1000.00	" ", 1956
1206	"	1000.00	" ", "
1235	"	1000.00	" ", 1957
1236	"	1000.00	" ", "
1237	"	1000.00	" ", "

Total Bonds: $14,000.00.

Coupons on Palo Verde Joint Levee District of Riverside and Imperial Counties, California, Bonds.

No. of Coupons	Am't each Coupon	Date Due	Date Presented	Total
3	$32.50	May 1, 1931		97.50
11	32.50	May 1, 1930		357.50
11	32.50	Nov. 1, 1930		357.50
11	32.50	May 1, 1931		357.50
11	32.50	Nov. 1, 1931		357.50
11	32.50	May 1, 1932		357.50
11	32.50	Nov. 1, 1932		357.50
11	32.50	May 1, 1933		357.50
11	32.50	Nov. 1, 1933		357.50
11	32.50	May 1, 1934		357.50
11	32.50	Nov. 1, 1934		357.50
11	32.50	May 1, 1935		357.50
11	32.50	Nov. 1, 1935		357.50
11	32.50	May 1, 1936		357.50
11	32.50	Nov. 1, 1936		357.50
11	32.50	May 1, 1937		357.50
11	32.50	Nov. 1, 1937		357.50
11	32.50	May 1, 1938		357.50

Total Coupons: $6175.00.

This claim includes interest at 7% per annum on each amount of bond principal and interest which has matured or will hereafter mature, from the respective dates of presentation to the treasurer of the district.

J. R. MASON.

Subscribed and sworn to before me this 15th day of July, 1938.

[Seal] GILBERT MOODY.

Notary Public in and for the County of Stanislaus, State of California.

[Endorsed]: Filed July 16, 1938.

(Title of District Court and Cause.)

PROOF OF CLAIM

State of California
County of Riverside—ss.

James H. Jordan, being first duly sworn, says: That he is a creditor of Palo Verde Irrigation District, the petitioner herein, and that he is the owner and holder of the following described bonds and coupons of said irrigation district, or on which said irrigation district is obligated for payment, to-wit:

That James H. Jordan is the owner of bonds in the principal amount of $21,000.00, $18,000.00 of which are Palo Verde Joint Levee District of Riverside and Imperial Counties, California, bonds, and $3,000.00 are Palo Verde Drainage District bonds, which said bonds bear the numbers hereinafter indicated, and are in the several amounts as indicated and will mature at the date indicated; that each of said bonds of Palo Verde Joint Levee District of Riverside and Imperial Counties, California, bear interest at the rate of 6½% per annum, evidenced by interest coupons payable on May 1st and November 1st of each year, and that each of said bonds of the Palo Verde Drainage District bear interest at the rate of 6% per annum, evidenced by interest coupons payable on January 1st and July 1st of each year; that said James H. Jordan is the owner and holder of all of the coupons attached to all of said bonds, of which coupons in the amount

of $7,737.50 have matured and were presented to the treasurer for payment, as hereinbelow [69] indicated, and bearing interest at the rate of 7% per annum from dates of presentation, and that interest will continue to accumulate both by way of maturing coupons at 6½% per annum on the bonds of the Palo Verde Joint Levee District of Riverside and Imperial Counties, California, and at 6% per annum on the bonds of the Palo Verde Drainage District, and by way of interest at 7% per annum on presented bonds and coupons until payment has been made; that there are no counter-claims or offsets to same. That a particular description of said claim is as follows:

Bonds of Palo Verde Joint Levee District of Riverside and Imperial Counties, California

Bond No.	Amount	Date Due
451	$1000.00	May 1, 1933
452	"	" " "
481	"	May 1, 1934
482	"	" " "
483	"	" " "
484	"	" " "
485	"	" " "
494	"	" " "
518	"	May 1, 1935
1133	"	May 1, 1954
1171	"	May 1, 1955
106	"	Nov. 1, 1934
117	"	Nov. 1, 1935
118	"	" " "
119	"	" " "
120	"	" " "
139	"	Nov. 1, 1938
140		" " "

Coupons on Bonds of Palo Verde Joint Levee District of Riverside and Imperial Counties, California.

Bond No.	No. of Coupons	Am't ea. Coupon	Date Due	Date Presented	Total
451-452	2	$32.50	May 1, 1931		$ 65.00
	2	32.50	Nov. 1, 1931		65.00
	2	32.50	May 1, 1932		65.00
	2	32.50	Nov. 1, 1932		65.00
	2	32.50	May 1, 1933		65.00
481	1	32.50	May 1, 1931		32.50
	1	32.50	Nov. 1, 1931		32.50
	1	32.50	May 1, 1932		32.50
	1	32.50	Nov. 1, 1932		32.50
	1	32.50	May 1, 1933		32.50
	1	32.50	Nov. 1, 1933		32.50
	1	32.50	May 1, 1934		32.50
482-483-	5	32.50	Nov. 1, 1931		162.50
484-485-	5	32.50	May 1, 1932		162.50
494	5	32.50	Nov. 1, 1932		162.50
	5	32.50	May 1, 1933		162.50
	5	32.50	Nov. 1, 1933		162.50
	5	32.50	May 1, 1934		162.50

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Bond No.	No. of Coupons	Am't ea. Coupon	Date Due	Date Presented	Total
518	1	$32.50	Nov. 1, 1931		$ 32.50
	1	32.50	May 1, 1932		32.50
	1	32.50	Nov. 1, 1932		32.50
	1	32.50	May 1, 1933		32.50
	1	32.50	Nov. 1, 1933		32.50
	1	32.50	May 1, 1934		32.50
	1	32.50	Nov. 1, 1934		32.50
	1	32.50	May 1, 1935		32.50
1133	~~1~~	~~32.50~~	~~May 1, 1930~~		~~32.50~~
	1	32.50	Nov. 1, 1930		32.50
	1	32.50	May 1, 1931		32.50
	1	32.50	Nov. 1, 1931		32.50
	1	32.50	May 1, 1932		32.50
	1	32.50	Nov. 1, 1932		32.50
	1	32.50	May 1, 1933		32.50
	1	32.50	Nov. 1, 1933		32.50
	1	32.50	May 1, 1934		32.50

Bond No.	No. of Coupons	Am't ea. Coupon	Date Due	Date Presented	Total
	1	32.50	Nov. 1, 1934		32.50
	1	32.50	May 1, 1935		32.50
	1	32.50	Nov. 1, 1935		32.50
	1	32.50	May 1, 1936		32.50
	1	32.50	Nov. 1, 1936		32.50
	1	32.50	May 1, 1937		32.50
	1	32.50	Nov. 1, 1937		32.50
	1	32.50	May 1, 1938		32.50
1171	1	32.50	May 1, 1931		32.50
	1	32.50	Nov. 1, 1931		32.50
	1	32.50	May 1, 1932		32.50
	1	32.50	Nov. 1, 1932		32.50
	1	32.50	May 1, 1933		32.50
	1	32.50	Nov. 1, 1933		32.50
	1	32.50	May 1, 1934		32.50
	1	32.50	Nov. 1, 1934		32.50
	1	32.50	May 1, 1935		32.50
	1	32.50	Nov. 1, 1935		32.50
	1	32.50	May 1, 1936		32.50
	1	32.50	Nov. 1, 1936		32.50
	1	32.50	May 1, 1937		32.50
	1	32.50	Nov. 1, 1937		32.50
	1	32.50	May 1, 1938		32.50
106	1	32.50	May 1, 1932		32.50
	1	32.50	Nov. 1, 1932		32.50
	1	32.50	May 1, 1933		32.50
	1	32.50	Nov. 1, 1933		32.50
	1	32.50	May 1, 1934		32.50
	1	32.50	Nov. 1, 1934		32.50
117-118-	4	32.50	Nov. 1, 1931		130.00
119-120	4	32.50	May 1, 1932		130.00
	4	32.50	Nov. 1, 1932		130.00
	4	32.50	May 1, 1933		130.00
	4	32.50	Nov. 1, 1933		130.00
	4	32.50	May 1, 1934		130.00
	4	32.50	Nov. 1, 1934		130.00
	4	32.50	May 1, 1935		130.00
	4	32.50	Nov. 1, 1935		130.00

Bond No.	No. of Coupons	Am't ea. Coupon	Date Due	Date Presented	Total
139-140	2	$32.50	May 1, 1931		$ 65.00
	2	32.50	Nov. 1, 1931		65.00
	2	32.50	May 1, 1932		65.00
	2	32.50	Nov. 1, 1932		65.00
	2	32.50	May 1, 1933		65.00
	2	32.50	Nov. 1, 1933		65.00
	2	32.50	May 1, 1934		65.00
	2	32.50	Nov. 1, 1934		65.00
	2	32.50	May 1, 1935		65.00
	2	32.50	Nov. 1, 1935		65.00
	2	32.50	May 1, 1936		65.00
	2	32.50	Nov. 1, 1936		65.00
	2	32.50	May 1, 1937		65.00
	2	32.50	Nov. 1, 1937		65.00
	2	32.50	May 1, 1938		65.00
148-149-	4	32.50	May 1, 1930		130.00
150-151	4	32.50	Nov. 1, 1930		130.00
	4	32.50	May 1, 1931		130.00
	4	32.50	Nov. 1, 1931		130.00
	4	32.50	May 1, 1932		130.00
	4	32.50	Nov. 1, 1932		130.00
	4	32.50	May 1, 1933		130.00
	4	32.50	Nov. 1, 1933		130.00
	4	32.50	May , 1, 1934		130.00
	4	32.50	Nov. 1, 1934		130.00
	4	32.50	May 1, 1935		130.00
519	1	32.50	May 1, 1932		32.50

Total $6597.50.

That said creditor on March 17, 1937, recovered judgment against the Palo Verde Irrigation District in the amount of $11,380.00, representing bonds and interest coupons of said Palo Verde Joint Levee District of Riverside and Imperial Counties, California, included among those hereinabove alleged and as follows:

Bond No.	Amount	Interest Coupons—Due Dates	Amount
451	$1000.00	5/1/31—5/1/33	162.50
452	1000.00	5/1/31—5/1/33	162.50
481	1000.00	5/1/31—5/1/34	227.50
482	1000.00	11/1/31—5/1/34	195.00
483	1000.00	11/1/31—5/1/34	195.00
484	1000.00	11/1/31—5/1/34	195.00
485	1000.00	11/1/31—5/1/34	195.00
494	1000.00	11/1/31—5/1/34	195.00
From Bond No.		Additional Int. Coupons Due Dates	
518		11/1/31—5/1/34	195.00
1133		11/1/30—5/1/34	260.00
106		5/1/32—5/1/34	162.50
117		11/1/31—5/1/34	195.00
118		11/1/31—5/1/34	195.00
119		11/1/31—5/1/34	195.00
120		11/1/31—5/1/34	195.00
139		5/1/31—5/1/34	227.50
140		5/1/31—5/1/34	227.50
	$8000.00		$3380.00

Total $11,380.00.

[72]

That said judgment was recovered in the Superior Court of Riverside County, California, in Action No. 25560, entitled "James H. Jordan, Plaintiff, v. Palo Verde Irrigation District and Palo Verde Joint Levee District of Riverside and Imperial Counties, California, Defendants"; that said cause is pending on appeal in the Fourth Circuit Court of Appeals of the State of California.

Bonds of Palo Verde Drainage District

Bond No.	Amount	Date Due
419	$500.00	Jan. 1, 1936
420	500.00	" " "
421	500.00	" " "
422	500.00	" " "
557	500.00	Jan. 1, 1937
558	500.00	" " "

Total Bonds: $3,000.00.

Coupons on Bonds of Palo Verde Drainage District

Bond No.	No. of Coupons	Am't ea. Coupon	Date Due	Date Presented	Total
419-420-	4	$15.00	July 1, 1930		$60.00
421-422	4	15.00	Jan. 1, 1931		60.00
	4	15.00	July 1, 1931		60.00
	4	15.00	Jan. 1, 1932		60.00
	4	15.00	July 1, 1932		60.00
	4	15.00	Jan. 1, 1933		60.00
	4	15.00	July 1, 1933		60.00
	4	15.00	Jan. 1, 1934		60.00
	4	15.00	July 1, 1934		60.00
	4	15.00	Jan. 1, 1935		60.00
	4	15.00	July 1, 1935		60.00
	4	15.00	Jan. 1, 1936		60.00
557-558	2	15.00	July 1, 1930		30.00
	2	15.00	Jan. 1, 1931		30.00
	2	15.00	July 1, 1931		30.00
	2	15.00	Jan. 1, 1932		30.00
	2	15.00	July 1, 1932		30.00
	2	15.00	Jan. 1, 1933		30.00
	2	15.00	July 1, 1933		30.00
	2	15.00	Jan. 1, 1934		30.00
	2	15.00	July 1, 1934		30.00
	2	15.00	Jan. 1, 1935		30.00
	2	15.00	July 1, 1935		30.00
	2	15.00	Jan. 1, 1936		30.00
	2	15.00	July 1, 1936		30.00
	2	15.00	Jan. 1, 1937		30.00

Total Coupons: $1140.00.

This claim includes interest at 7% per annum on each amount [73] of bond principal and interest which has matured or will hereafter mature, from the respective dates of presentation to the treasurer of the district.

JAMES H. JORDAN.

Subscribed and sworn to before me this 12th day of July, 1938.

[Seal] LOLA M. SLABOUGH.

Notary Public in and for the County of Riverside, State of California.

[Endorsed]: Filed July 16, 1938.

[74]

(Title of District Court and Cause.)

PROOF OF CLAIM

State of California
County of Los Angeles—ss.

George F. Covell, being first duly sworn, says:

That he is a creditor of Palo Verde Irrigation District, the petitioner herein, and that he is the owner and holder of the following described bonds and coupons of said irrigation district, to-wit:

That said George F. Covell is the owner of bonds in the principal amount of $10,000.00, which said bonds bear the numbers hereinafter indicated, and are in the several amounts as indicated and will

mature at the date indicated; that each of said bonds bear interest at the rate of 6% per annum, evidenced by interest coupons payable on January 1st and July 1st of each year; that said George F. Covell is the owner and holder of all the coupons attached to said bonds, of which coupons in the amount of $5100.00 have matured and were presented to the treasurer for payment, as hereinbelow indicated, and bearing interest at the rate of 7% per annum from dates of presentation, and that interest will continue to accumulate both by way of maturing coupons at 6% per annum and by way of interest at 7% per annum on presented bonds and coupons until payment has been made; that there are no counter-claims or off-sets to same. That a particular description of said claim is as follows: [75]

BONDS

Bond No.	Amount	Date Due
2296	$1000.00	July 1, 1952
2297	1000.00	" " "
2298	1000.00	" " "
2299	1000.00	" " "
2300	1000.00	" " "
2301	1000.00	" " "
2302	1000.00	" " "
2303	1000.00	" " "
2304	1000.00	" " "
2305	1000.00	" " "

Total Bonds: $10,000.00

COUPONS

No. of Coupons	Am't each Coupon	Date Due	Date Presented	Total
10	$30.00	July 1, 1930		$300.00
10	30.00	Jan. 1, 1931		300.00
10	30.00	July 1, 1931		300.00
10	30.00	Jan. 1, 1932		300.00
10	30.00	July 1, 1932		300.00
10	30.00	Jan. 1, 1933		300.00
10	30.00	July 1, 1933		300.00
10	30.00	Jan. 1, 1934		300.00
10	30.00	July 1, 1934		300.00
10	30.00	Jan. 1, 1935		300.00
10	30.00	July 1, 1935		300.00
10	30.00	Jan. 1, 1936		300.00
10	30.00	July 1, 1936		300.00
10	30.00	Jan. 1, 1937		300.00
10	30.00	July 1, 1937		300.00
10	30.00	Jan. 1, 1938		300.00
10	30.00	July 1, 1938		300.00

Total Coupons: $5100.00.

This claim includes interest at 7% per annum on each amount of bond principal and interest which has matured or will hereafter mature, from the respective dates of presentation to the treasurer of the district.

GEORGE F. COVELL.

Subscribed and sworn to before me this 18th day of July, 1938.

[Seal] R. S. ZIMMERMAN,

Clerk, U. S. District Court, Southern District of California.

[Endorsed]: Filed July 18, 1938.

[76]

At a stated term, to-wit: The February Term, A. D. 1938, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, Calif. on Monday the 18th day of July in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable Geo. Cosgrave, District Judge.

(Title of Cause.)

This matter coming on for hearing on order, filed May 13, 1938, approving Petition re verified Petition of Palo Verde Irrigation District for composition of debts, etc.; A. B. Shaw, Jr., Esq., appearing for the petitioner, makes a statement; W. Coburn Cook, Esq., appearing for the respondents James H. Jordan, et al., makes a statement; (H. A. Dewing being present as court reporter and reporting the proceedings); whereupon, the following exhibits are offered and admitted in evidence:

Petitioner's Exhibit 1.

Three (3) bundles marked Petitioner's Ex. 11, 12, and 13, respectively, in a Superior Court; Map; reporter's transcript of testimony before H. G. Ames, Superior Judge, and large envelope containing exhibits in Case No. 29,147 in Superior Court, County of Riverside.

Petitioner's Exhibit 2.

Acceptance of Plan of Composition, 3 pages.

Respondent's Exhibit A.

Acceptance of Plan of Readjustment of indebtedness of Palo Verde Irrigation District of Blythe, Calif.

Respondent's Exhibit B.

Copy of Petition for readjustment of debts in case No. 29,147, in Superior Court, County of Riverside.

Attorney Childers of El Centro appearing with Attorney Cook, argues in opposition, whereupon,

It is ordered that the matter be submitted on points and authorities to be presented simultaneously in five (5) days. [77]

(Title of District Court and Cause.)

MEMORANDUM OF ORDER

Cosgrave, District Judge.

The objections heretofore filed by James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin to the hearing of the petition for composition of debts of Palo Verde Irrigation District are overruled.

An exception is noted in favor of the said parties objecting against this ruling.

The said matter having been submitted to the Court for decision upon the record adduced on July

18, 1938 and such record having been by the Court duly considered, the issues herein are resolved in favor of the Palo Verde Irrigation District, petitioner aforesaid.

Petitioner will propose an order in accordance herewith, wherein exception is reserved in favor of the objecting creditors.

August 4, 1938. [78]

(Title of District Court and Cause.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter coming on regularly for hearing on the 18th day of July, 1938, before the above entitled Court, Honorable George Cosgrave, District Judge, presiding, upon the merits of the plan of composition of debts, proposed by petitioner, Palo Verde Irrigation District, and upon the petition filed by said petitioner, and the answer and objections of respondents James H. Jordan, First National Bank of Tustin, California, a corporation, J. R. Mason, George F. Covell and L. F. Abadie, and said petitioner having appeared by Arvin B. Shaw, Jr., of Stewart, Shaw & Murphey, its attorneys, and said respondents having appeared by W. Coburn Cook, their attorney, and said respondents having made certain objections to the jurisdiction of the Court and objections to the introduction of any evidence under the petition, which said objections were overruled, with exceptions allowed to respondents, and

it appearing from the records and files of this Court that notice of this hearing has been regularly given, in accordance with Chapter X of the National Bankruptcy Act, and that this Court has jurisdiction to hear said petition on the merits, and said hearing having been ordered to proceed before said Court, and evidence having been offered and introduced on said 18th day of July, 1938, on behalf of the parties appearing and said matter having been submitted on memoranda of authorities to be submitted by the parties, and such memoranda having been filed on behalf of said parties, the Court being fully [79] advised in the premises, therefore makes and files its Findings of Fact and Conclusions of Law in the said matter, to-wit:

Findings of Fact.

The Court finds:

I.

That petitioner is an irrigation district within the meaning of Section 81 of the National Bankruptcy Act, duly organized on October 27, 1923, and now existing under and by virtue of the provisions of that certain Act of the Legislature of the State of California known as the "Palo Verde Irrigation District Act", (Stats. Cal. 1923, p. 1067) approved June 21, 1923, as amended.

II.

That the lands within the boundaries of petitioner aggregate 95,000 acres and are situate in the Coun-

ties of Riverside and Imperial, California and within said Southern District of California and within the territorial jurisdiction of this Court. That the greater portion of said lands is situate in said County of Riverside. That the office of petitioner is situate in the City of Blythe, in said County of Riverside.

III.

That said petitioner was organized for the purpose of taking over and merging in one organization the properties and functions of three separate entities theretofore existing in the territory known as the Palo Verde Valley, which territory is now embraced within the boundaries of petitioner. That said three entities consisted of Palo Verde Mutual Water Company, a private corporation owning and operating an irrigation system in said Valley, Palo Verde Joint Levee District of Riverside and Imperial Counties, California, a levee district owning and operating a levee system in said Valley, and Palo Verde Drainage District, a drainage district owning and operating a drainage system in said Valley. [80]

IV.

That said Mutual Water Company was duly organized under the laws of the State of California on March 9, 1908, for the principal purpose of constructing, operating and maintaining an irrigation system in said Valley, and did construct, operate and maintain such system until the transfer of said system to petitioner, as hereinafter found. That

on or about February 1, 1916, said Mutual Water Company executed a certain deed of trust, dated on said day, wherein and whereby it conveyed said irrigation system to Los Angeles Trust & Savings Bank, a banking corporation, in trust as security for the payment of coupon bonds of said Mutual Water Company dated on said day, in the aggregate principal amount of $500,000.00, payable serially on February 1 of each year from 1921 to 1936, inclusive, with interest at the rate of six (6%) per cent per annum payable February 1 and August 1 of each year. That said deed of trust was duly recorded in the office of the County Recorder of said County of Riverside in Book 443 of Deeds at Page 1, et seq. That thereafter said Mutual Water Company sold and issued all of said bonds. That there now remain unpaid bonds of said issue in the principal amount of $170,000.00, together with interest coupons thereon maturing August 1, 1932, and thereafter. That by reason of various consolidations of banks, Security-First National Bank of Los Angeles, a national banking association, has succeeded to the office of trustee under said deed of trust.

V.

That, pursuant to the provisions of Section 11 of said Palo Verde Irrigation District Act, said Mutual Water Company transferred its said irrigation system to petitioner by deed dated December 1, 1925, and in and by said deed petitioner assumed and agreed to pay when due the principal and interest on

each and all of the bonds secured by said deed of trust then remaining unpaid. That said deed was duly recorded in the office of the County Recorder of said County of Riverside in Book 662 at Page 152 of Official Records of said County.

VI.

That said Levee District was duly organized on July 17, 1914, under and by virtue of the provisions of that certain Act of the Legislature of the State of California entitled "An act to provide for the formation of levee districts in the various counties of this state, and to provide for the erection of levees, dikes and other works for the purpose of protecting the lands within such districts from overflow and to levy assessments to erect and construct and maintain such levees, dikes and other works and to pay the necessary costs and expenses of maintaining said districts", (Stats. Cal. 1905, p. 327) approved March 20, 1905, as amended. That said Levee District constructed, operated and maintained a levee system in said Palo Verde Valley until the organization of Petitioner. That on or about May 1, 1918, said Levee District authorized, pursuant to the provisions of that certain Act of the Legislature of the State of California entitled "An act authorizing levee districts of the State to incur a bonded indebtedness for the purpose of building, constructing, or repairing levees of the district; or for excavating and constructing ditches or canals of such districts, or for the purpose of acquiring rights of way for

any such levees, ditches, or canals; or for any and all of said purposes", (Stats. Cal. 1911, p. 303) approved March 8, 1911, as amended, an issue of coupon bonds of said District designated "First Issue", dated May 1, 1918, in the aggregate principal amount of $1,253,951.86, payable serially on May 1 of each year from 1919 to 1958, inclusive, with interest at the rate of 6½% per annum payable May 1 and November 1 of each year thereafter. That thereafter said Levee District sold and issued all of said bonds. That there now remain unpaid bonds of said First Issue in the principal amount of $911,951.86, together with substantially all interest coupons thereon maturing May 1, 1930, and thereafter.

VII.

That on or about November 1, 1922, said Levee District authorized pursuant to the provisions of said Act approved March 8, 1911, an issue of coupon bonds of said district, designated "Second Issue", dated November 1, 1922, in the aggregate principal amount of $371,378.50, payable serially on November 1 of each year from 1923 to 1962, inclusive, with interest at the rate of 6½% per annum payable May 1 and November 1 of each year. That said Levee District thereafter sold and issued all of said bonds. That there now remain unpaid bonds of said Second Issue in the principal amount of $304,378.50, together with substantially all interest coupons thereon maturing May 1, 1930, and thereafter.

VIII.

That by virtue of the provisions of Section 12 of said Palo Verde Irrigation District Act said Levee District was, upon the organization of Petitioner, merged in and superseded by Petitioner and ceased to exist except in so far as may be necessary to preserve the rights of bondholders and other creditors, and Petitioner assumed all of the outstanding indebtedness of said Levee District, including the principal and interest on said bonds of said First and Second Issues.

IX.

That said Drainage District was duly organized on August 16, 1921, under and by virtue of the provisions of that certain Act of the Legislature of the State of California entitled "An act to provide for the organization and government of drainage districts, for the drainage of agricultural lands other than swamp and overflowed lands, and to provide for the acquisition or construction thereby of works for the drainage of the lands embraced within such districts" (Stats. Cal. 1903, p. 291) approved March 20, 1903, as amended. That said Drainage District constructed, operated and maintained a drainage system in said Palo Verde Valley until the organization of Petitioner. That on or about December 1, 1921, said Drainage District authorized, pursuant to said Act approved March 20, 1903, an issue of coupon bonds, dated December 1, 1921, in the aggregate principal amount of $850,000.00, payable seri-

ally on January 1 of each year from 1933 to 1942, inclusive, with interest at the rate of 6% per annum payable January 1 and July 1 of each year. That thereafter said Drainage District sold and issued bonds of said issue of the aggregate principal amount of $250,000.00 and said Petitioner, after its organization, sold and issued bonds of said issue of the aggregate principal amount of $600,000.00. That all bonds of said issue are now unpaid, together with substantially all interest coupons thereon maturing July 1, 1930, and thereafter.

X.

That by virtue of the provisions of Section 13 of said Palo Verde Irrigation District Act said Drainage District was, upon the organization of Petitioner, merged in and superseded by Petitioner and ceased to exist except in so far as may be necessary to preserve the rights of bondholders and other creditors, and Petitioner assumed all of the outstanding indebtedness of said Drainage District, including the principal and interest on all said bonds authorized by said Drainage District.

XI.

That on or about September 1, 1925, pursuant to the provisions of said Palo Verde Irrigation District Act, Petitioner authorized an issue of coupon bonds designated "First Issue", dated on said day, in the aggregate principal amount of $3,287,000.00, payable serially on July 1 of each year from 1937 to 1955,

inclusive, with interest at the rate of 6% per annum payable January 1 and July 1 of each year. That thereafter Petitioner sold and issued bonds of said First Issue in the aggregate principal amount of $1,-725,000.00, all of which said bonds, together with substantially all interest coupons thereon maturing July 1, 1930, and thereafter, are now unpaid. That [84] on June 15, 1934, pursuant to the provisions of Section 23 of said Palo Verde Irrigation District Act, as amended, the unsold bonds of said First Issue, aggregating in principal amount $1,562,000.00, were destroyed.

XII.

That on or about September 1, 1925, pursuant to the provisions of said Palo Verde Irrigation District Act, Petitioner authorized an issue of coupon bonds designated "Second Issue", dated on said day, in the aggregate principal amount of $213,000.00, payable serially on July 1 of each year from 1937 to 1955, inclusive, with interest at the rate of 6% per annum payable January 1 and July 1 of each year. That thereafter Petitioner sold and issued all of said bonds of said Second Issue, all of which said bonds, together with substantially all interest coupons thereon maturing July 1, 1930, and thereafter, are now unpaid.

XIII.

That on or about February 1, 1930, Petitioner, for value received, executed its promissory note, dated on said day, payable to the order of D. A. Foley and Co. and thereafter assigned to Bank of

America, for the principal sum of $4,000.00, payable January 2, 1932, with interest thereon at the rate of 7% per annum. That said note, together with interest thereon from date thereof, is unpaid.

XIV.

That Petitioner is unable to meet its obligations above mentioned as they mature and that it desires to effect a plan for the composition of its debts under the provisions of Sections 81, 82 and 83 of that certain Act of the Congress of the United States of America, entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, as amended. That on account of adverse agricultural conditions in said Palo Verde Valley and the general depression which has prevailed during the greater part of the [85] past twelve years, the market value of farm products within said Valley has generally been less than the cost of production; that farming operations therein have been unprofitable; that Petitioner in good faith levied taxes to pay its bonded indebtedness and operating expenses from the year 1927 to the year 1932, inclusive, but that said taxes were greater than the ability of the land to produce, or of the farmers to pay and Petitioner was, is and will continue to be unable to collect sufficient revenues to pay said obligations, or a greater amount of revenues than will carry out the plan of composition hereafter mentioned.

XV.

That a plan of composition of the debts of Petitioner hereinabove described was prepared and filed and submitted with its petition. That a true copy of said plan is hereto attached, marked "Exhibit A", and by this reference is made a part hereof.

That (1) the procedure to be followed, respectively, in the levy and collection of taxes, special assessment taxes or special assessments for the payment of the refunding bonds referred to in said plan (2) the character and effect of, and method of enforcing the liens sought to be created by the issuance of such refunding bonds and (3) the rights of the holders of such refunding bonds upon the issuance thereof, are in all respects such as are prescribed by the Palo Verde Irrigation District Act and acts amendatory thereof and supplementary thereto.

XVI.

That the unpaid coupon bonds hereinabove mentioned and said promissory note evidence the only indebtedness to be affected by said plan of composition and the holders of said bonds and note are the only creditors of Petitioner affected by said plan, within the meaning of said Chapter X. That none of said indebtedness is owned, held, or controlled by Petitioner. [86]

XVII.

That Reconstruction Finance Corporation, an agency of the United States of America, at the time

of the filing of said petition, owned and held and now owns and holds not less than fifty-one (51) per centum in amount, viz., more than ninety-six (96) per centum in amount of all indebtedness affected by said plan, and owned and held and now owns and holds said promissory note and more than ninety-five (95) per centum in amount of each of the issues of bonds above mentioned. That a true and correct list of said securities owned and held by said Corporation, as aforesaid, was attached to said petition, marked "Exhibit B", and by this reference made a part hereof.

That subsequent to the filing of said petition, said Reconstruction Finance Corporation, as authorized and permitted by order herein filed, purchased and acquired certain of said securities and now owns and holds, in addition to the securities listed in said Exhibit B, attached to said petition, the following:

Palo Verde Mutual Water Company, Bond No. 973, amount $100.00.

Palo Verde Irrigation District, First Issue, Bonds Nos. 869, 870, 871, 872, 2763, 2843, 2844, 2845, 2846, and 2847, amount $1000.00 each.

XVIII.

That on May 5 1938, said Reconstruction Finance Corporation, in writing dated on said day, accepted said plan of composition. That said Reconstruction Finance Corporation has authorized a loan to Petitioner in the sum of $1,039,423.00, to enable it fully to effect said plan.

XIX.

That a list of all known creditors of petitioner affected by said plan, other than Reconstruction Finance Corporation, with their addresses, so far as was known to Petitioner at the time of filing said petition, and a description of their respective claims, which [87] list shows only persons who have not accepted said plan, was attached to said petition marked "Exhibit C" and by this reference is made a part hereof.

XX.

That all claims against Petitioner are payable without preference from taxes levied against the lands within Petitioner and are of a single class.

XXI.

That said plan of composition is fair, equitable and for the best interests of Petitioner's creditors who are affected thereby and does not discriminate unfairly in favor of any creditor or class of creditors. That said plan complies with the provisions of Chapter X of said Act of Congress. That said plan has been accepted and approved as required by the provisions of subdivision (d) of Section 83 of said Act of Congress. That all amounts to be paid by the Petitioner for services or expenses incident to the composition have been fully disclosed and are reasonable. That the offer of the plan and its acceptance are in good faith. That the petitioner is authorized by law to take all action necessary to be taken by it to carry out the plan.

XXII.

That on the 10th day of May, 1938, the Board of Trustees of said Petitioner adopted a resolution, proposing said plan of composition, a certified copy of which said resolution was attached to said petition, marked "Exhibit E" and by this reference is made a part hereof. That in and by said resolution said Petitioner authorized the filing of said petition and authorized Messrs. Stewart, Shaw & Murphey, its duly and regularly appointed attorneys to file the same and to represent Petitioner in the proceedings with respect thereto in the competent United States District Court. [88]

XXIII.

That the following designated actions have heretofore been commenced in the Superior Court of the State of California, in and for the County of Riverside, against Petitioner and in some cases against said Levee District or said Drainage District upon bonds or coupons, or both, issued by one or more of said three districts for the purpose of obtaining judgments against Petitioner and said Levee District or said Drainage District and in some cases against others, on account of such bonds or coupons, or both, and the enforcement of lien or the levy of taxes therefor, to-wit:

1. Case No. 25393, entitled "Theo. Bernhard, Plaintiff, v. Palo Verde Irrigation District and Palo Verde Joint Levee District", in which George Herrington is attorney for plaintiff.

2. Case No. 25560, entitled "James H. Jordan, Plaintiff, vs. Palo Verde Irrigation District and Palo Verde Joint Levee District, Defendants", in which W. Coburn Cook, Esq., is attorney for plaintiff.

3. Case No. 25561, entitled "James H. Jordan, plaintiff, vs. Palo Verde Irrigation District and Palo Verde Drainage District, Defendants", in which said Cook is attorney for plaintiff.

4. Case No. 25579, entitled "George F. Covell, Plaintiff, vs. Palo Verde Irrigation District, County of Riverside and County of Imperial, Defendants", in which said Cook is attorney for plaintiff.

5. Case No. 25587, entitled "J. R. Mason, Plaintiff, vs. Palo Verde Irrigation District, Palo Verde Joint Levee District, County of Riverside and County of Imperial, Defendants", in which said Cook is attorney for plaintiff.

6. Case No. 25588, entitled "First National Bank of Tustin, California, Plaintiff, vs. Palo Verde Irrigation District and Palo Verde Drainage District, Defendants", in which said Cook is attorney for Plaintiff.

7. Case No. 25594, entitled "L. F. Abadie, Plaintiff, vs. Palo Verde Irrigation District, Defendants", in which said Cook is attorney [89] for plaintiff.

8. Case No. 26604, entitled "J. R. Mason, Plaintiff, vs. Palo Verde Irrigation District and Palo Verde Joint Levee District of Riverside and Imperial Counties, California, Defendants", in which W. Coburn Cook, Esq. is attorney for plaintiff.

9. Case No. 28684, entitled "James H. Jordan, J. R. Mason, First National Bank of Tustin, California, a corporation, L. F. Abadie and C. F. Veysey, Petitioners vs. Palo Verde Irrigation District et al., Respondents", in which Petitioner's Board of Trustees and officers are respondents and said Cook is attorney for petitioners.

10. Case No. 28881, entitled "First National Bank of Tustin, California, Plaintiff, vs. Palo Verde Irrigation District and Palo Verde Drainage District, Defendants", in which said Cook is attorney for plaintiff.

11. Case No. 28882, entitled "James H. Jordan, Plaintiff, vs. Palo Verde Irrigation District and Palo Verde Drainage District, Defendants", in which said Cook is attorney for plaintiff.

12. Case No. 28883, entitled "James H. Jordan, Plaintiff, vs. Palo Verde Irrigation District and Palo Verde Joint Levee District, Defendants", in which said Cook is attorney for plaintiffs.

XXIV.

That the following designated action has heretofore been commenced in the Superior Court of the State of California, in and for the County of Alameda, for the purpose of obtaining judgment against Petitioner on account of coupons of bonds issued by Petitioner to-wit:

1. Case No. 140604, entitled "N. J. Cornwall, Plaintiff, vs. Palo Verde Irrigation District, Defendant", in which Messrs. Clark, Nichols and Eltse are attorneys for plaintiff.

XXV.

That the following designated action has heretofore been [90] commenced in the Justice's Court of Riverside Township, County of Riverside, State of California, for the purpose of obtaining judgment against Petitioner on account of coupons of bonds issued by Petitioner, to-wit:

1. Case No. 2204, entitled "C. F. Veysey, Plaintiff, vs. Palo Verde Irrigation District, Defendant", in which said Cook is attorney for plaintiff.

XXVI.

That said cases Nos. 25393 and 140604 have been dismissed.

That in said case No. 25560 a default judgment was given and made by said Superior Court in favor of plaintiff therein and against defendant Levee District, and in said case Nos. 25561 and 25588 default judgments were likewise rendered in favor of plaintiff therein and against defendant Palo Verde Drainage District, all on the 11th day of March, 1935.

That in said three actions Nos. 25560, 25561 and 25588 Petitioner, appearing in its own capacity as an irrigation district and also in its capacity as statutory successor to and representative of and on behalf of said Drainage District and said Levee District, appealed from said default judgments to the District Court of Appeal of the State of California, in and for the Fourth Appellate District; that said appeals are pending undetermined before said Court.

That in said actions Nos. 25560 and 25588 judgments were rendered by said Superior Court in favor of plaintiff therein and against Petitioner and said case No. 25561 was ordered transferred to said Justice's Court, all on the 7th day of April, 1937. That Petitioner has appealed from said judgments to said District Court of Appeal and said appeals are pending undetermined before said Court.

That in said action No. 28684, said Superior Court, on December 29, 1936, gave and made its alternative writ of mandate, requiring Petitioner to pay certain of its funds to the petitioners in said action, or show cause why it had not done so. That Petitioner is, by said writ, restrained from free use or disposal of certain of its funds. [91]

XXVII.

That on or about the 20th day of April, 1937, Petitioner filed in the Superior Court of the State of California in and for the County of Riverside, a petition, in case No. 29147, under the provisions of that certain act of the Legislature of California, designated the "Irrigation District Refinancing Act" (Stats. Cal. 1937, Chapter 24) approved March 30, 1937. That in and by said petition a plan of readjustment of debts, generally similar in character to, but not identical with, the plan of composition herein submitted, was presented to said Superior Court. That a hearing was held before said Superior Court on the merits of said plan of re-

adjustment and after submission of said hearing, said Court, on motion of said Petitioner, ordered said submission set aside and said proceeding dismissed without prejudice. That the respondents herein have appealed from said order to the Supreme Court of the State of California.

XXVIII.

That unless restrained by order of this Court, the plaintiffs and their attorneys, in each and all of the actions, other than Case No. 25393, mentioned in Paragraphs numbered XXIII, XXIV and XXV of these findings and the appellants in said Case No. 29147 will take action and proceedings looking to the enforcement of the levy of taxes for the payment of the bonds and coupons involved in said actions and for that reason in certain of said actions the Counties of Riverside and Imperial are joined as parties defendant; that unless the continuation and prosecution of each and all of said actions and of all proceedings in the appeals mentioned in paragraph numbered XXVI of these findings against all defendants therein named and all proceedings against petitioner in said appeal in said Case No. 29147 are enjoined by order of this Court, proceedings in said actions and appeals would interfere with and in part render ineffective the [92] carrying out of the plan of composition herein submitted and the jurisdiction of this Court herein would be interfered with and Petitioner would be irreparably damaged.

XXIX.

That it is not true that 96%, or any, of the obligations of Petitioner alleged in its petition have been paid, either with funds obtained from or furnished by Reconstruction Finance Corporation, or otherwise. That it is not true that by a contract, or contracts, or otherwise, duly or at all made between Petitioner and said Corporation Petitioner is obligated to said Corporation in an amount equal to 24.81% or any percentage of 96% or any percentage of the total obligations alleged in said petition, or in a total sum of $966,000.00, or any sum less than the whole sum of principal and interest evidenced by the face of said obligations, together with interest thereon at the rate of 4% per annum, payable semi-annually, and no more. That by the only contracts executed between Petitioner and said Corporation, Petitioner is obligated to said Corporation for the full amount of principal and interest evidenced by the note and bonds held by said Corporation, as herein found, according to the tenor of the face of said note and bonds. That said Corporation has neither loaned nor advanced any funds to Petitioner. That neither $4,000,000.00, nor any amount, of the principal obligations of Petitioner alleged in its petition, nor approximately $1,500,-000.00, nor any amount, in interest coupons attached to any of the bonds representing such obligations, has in fact, or in legal effect, or otherwise, been extinguished.

XXX.

That said plan of composition does not discriminate unfairly in favor of Reconstruction Finance Corporation. [93]

XXXI.

That said plan was not prepared or substantially completed or executed several years, or any time longer than one month, before the commencement of this proceeding. That said plan is a plan of composition pursuant to said Chapter X.

XXXII.

That it is not true that the only persons or parties affected by said plan are certain owners and holders of bonds and interest coupons which Petitioner is obligated to pay, including the respondents, who have not consented nor agreed to said plan. That it is true that all owners and holders of the securities described in the petition herein, including all who have, as well as all who have not, consented to said plan, are creditors affected by said plan.

XXXIII.

That Reconstruction Finance Corporation did not accept said plan several years ago, or at any time prior to May 5, 1938. That said Corporation was not, nor is it, nor was Petitioner, nor is it, bound by said plan prior to the commencement of this proceeding. That said Corporation is affected by said plan.

XXXIV.

That it is not true that each bond issue of Petitioner, or on which Petitioner is obligated, is of a distinct and separate, or distinct or separate class. That it is not true that each bond or each interest coupon, when presented for payment, is of a distinct and separate, or distinct or separate class. That, on the contrary, all of said bond issues, and all of said bonds and said interest coupons, whether presented for payment or not, constitute, within the meaning of said Chapter X, but a single class of obligations.

XXXV.

That it is not true that said plan is inequitable, unjust or unfair to respondents, or any of them. That it is not true that [94] Petitioner, by the exercise of reasonable, or any degree of, diligence, or at all, is or will be financially able to pay the obligations owned by respondents, or any of them, in full and according to their terms, or in full or according to the terms of them, or any of them.

XXXVI.

That on March 29, 1935, Petitioner filed in this Court its petition for readjustment of debts, being case No. 25394-C in bankruptcy, under Chapter IX of said Act of Congress and set up in said petition a plan of readjustment of debts generally similar in character to, but not identical with the plan of composition proposed herein and alleged that approximately, but not exactly, the same creditors

were affected by said plan of readjustment and alleged many, but not all, of the same facts that are alleged in this proceeding, and prayed for the enforcement of a similar, but not identical plan. That said petition filed under said Chapter IX came on regularly for hearing before the undersigned District Judge and evidence was introduced by the parties and said matter was argued and submitted. That thereafter said District Judge rendered his opinion in favor of Petitioner, but before his findings of fact, conclusions of law and interlocutory judgment were signed and filed, the Supreme Court of the United States, in the case of Ashton vs. Cameron County Water Improvement District No. 1, held said Chapter IX unconstitutional. That thereafter, being moved thereto solely by reason of the unconstitutionality of said Chapter IX, said District Judge made and entered a judgment of dismissal of Petitioner's petition. That said judgment of dismissal became final, but by the force and effect, or force or effect thereof none of the matters alleged in the present petition is res adjudicata. That this Court has power and jurisdiction to consider and adjudicate each and all of said matters in this proceeding. [95]

XXXVII.

That said Case No. 29147 is not now pending in said Superior Court of the State of California in and for the County of Riverside, but is pending in the Supreme Court of California, upon appeal. That said cause involves many of, but not identic-

ally, the same matters and facts alleged in the petition in this proceeding. That the plan sought to be enforced in said Case No. 29147 has never become binding upon, or as to, Petitioner or Reconstruction Finance Corporation. That said Corporation is a creditor affected by this proceeding and by the plan of composition herein.

XXXVIII.

That none of the obligations of Petitioner referred to in the petition herein are also obligations of the County of Riverside, California. That this Court has power and jurisdiction to consider, allow and approve a plan of composition in this proceeding involving and affecting all of the obligations referred to in said petition.

XXXIX.

That petitioner and its obligations are subject and amenable to the bankruptcy power of the Congress of the United States of America in this proceeding. That the State of California has consented, and can consent, to this proceeding by Petitioner. That such consent is not unconstitutional, nor void.

XL.

That Chapter X of said Act of Congress is not unconstitutional, nor void.

XLI.

That respondent James H. Jordan on March 12, 1935, obtained a judgment in said Case No. 25560,

in the Superior Court of the State of California in and for the County of Riverside against Palo Verde Joint Levee District of Riverside and Imperial Counties, California, for the sum of $11,380.00 and in the same cause said respondent on [96] March 17, 1937, obtained a judgment against Petitioner for the sum of $11,380.00; that appeals were taken by the defendants in said cause from said judgments and said appeals are pending undetermined in the District Court of Appeal of the State of California, in and for the Fourth Appellate District; that no final judgment has ever been rendered in said cause against Petitioner or said Levee District. That respondent First National Bank of Tustin, California likewise obtained judgment in Case No. 25588 against Palo Verde Drainage District and Petitioner; that appeals were taken by the defendants in said cause from said judgments and said appeals are pending undetermined in said District Court of Appeal; that no final judgment has ever been rendered in said cause against Petitioner or said Drainage District. That all of the judgments mentioned in this paragraph are unsatisfied. That each of the respondents have actions pending against Petitioner, and in some of the cases herein mentioned, against said Levee District, or said Drainage District, upon the unpaid portions of their claims; that respondents are not severally entitled to judgment in said actions except for the restraining order issued in this proceeding; that said inchoate judgments and alleged causes of action are

provided for and are subject to composition as provided in the plan of composition herein proposed.

XLII.

That notice of the holding of said hearing has been given as required by law and the order of this Court, and the fees required by law have been paid, and said plan of composition as modified is now regularly before the Court for confirmation.

XLIII.

That the market value of each and all of the securities affected by the plan of composition, including all unpaid coupons attached to said bonds, was at no time between December 11, 1930, and January 30, 1934, greater than fourteen per cent of the principal amount thereof, [97] regardless of accrued interest. That from said first mentioned date the market value of such securities steadily declined until such value about the beginning of the year 1933 was approximately two per cent of such principal amount, regardless of accrued interest. That at no time between said first mentioned date and the hearing herein was the market value of any of said securities greater than twenty-one and one-half per cent of the principal amount thereof, regardless of accrued interest. That by reason of said facts, the confirmation of said plan of composition would be and is beneficial to and for the best interests of Petitioner's creditors, and each of them.

XLIV.

That said plan of composition should be approved and confirmed. [98]

CONCLUSIONS OF LAW.

And from the foregoing facts found, the Court concludes as follows:

I.

That this Court has jurisdiction of the subject matter of this proceeding and of all parties to and persons interested in this proceeding, including Petitioner, respondents and all other creditors of Petitioner, of said Levee District and of said Drainage District.

II.

That Petitioner is entitled to have an order entered confirming and approving said plan of composition.

III.

That the claim filed by Reconstruction Finance Corporation, as owner of the promissory note and bonds aggregating in principal amount of $4,043,-730.36 should be approved and allowed.

IV.

That the owners of and all persons interested in all securities affected by said plan of composition, other than the above mentioned note and bonds owned by Reconstruction Finance Corporation, should be required to deposit their securities with a disbursing agent, or the Clerk, in a reasonable

time and that the time specified in the interlocutory decree made by the Court herein, of even date herewith, is reasonable.

V.

That notice to all creditors of Petitioner, directing them to file and evidence their claims should be given in a reasonable time and manner and that the time and manner of such notice specified in said interlocutory decree of even date herewith are reasonable.

VI.

That during the pendency of these proceedings any holder of securities affected by said plan is entitled to sell to Reconstruction Finance Corporation and the latter entitled to buy from him any of [99] said securities, and said Reconstruction Finance Corporation is entitled to present its supplemental claim herein, as to such securities or as to any securities owned by it for which its claim has not been allowed or approved.

VII.

That Petitioner is entitled to injunctive orders such as are set out in said interlocutory decree.

VIII.

That the costs and expenses of this proceeding accrued to date hereof should be taxed against Petitioner.

Let said interlocutory decree be entered accordingly.

Let an exception be allowed to respondents.

Done in the above entitled Court in Chambers, in the City of Los Angeles, California, in said Southern District of California, this 6th day of October, 1938.

GEO. COSGRAVE,
District Judge.

Received September 19, 1938, 9 a. m. Disapproved as to form under Rule 8 and objections presented herewith September 22, 1938.

W. COBURN COOK,
Attorney for Respondents.

Objections considered and overruled.

GEO. COSGRAVE,
District Judge.

[100]

EXHIBIT "A"

PLAN OF COMPOSITION
PALO VERDE IRRIGATION DISTRICT.

Palo Verde Irrigation District, being unable to meet its debts as they mature, desires to effect the following plan of composition:

Said debts consist principally of issued, outstanding and unpaid bonds issued or assumed by said District, to-wit, bonds issued by the following entities and in the amounts hereinafter set opposite the names of such entities, to-wit:

Palo Verde Mutual Water Company,	Principal Amount	$170,000.00
Palo Verde Joint Levee District of Riverside and Imperial Counties, California, first issue,	Principal Amount	$911,951.86
Palo Verde Joint Levee District of Riverside and Imperial Counties, California, second issue,	Principal Amount	$304,378.50
Palo Verde Drainage District,	Principal Amount	$850,000.00
Palo Verde Irrigation District, first issue,	Principal Amount	$1,725,000.00
Palo Verde Irrigation District, second issue,	Principal Amount	$213,000.00
	Total	$4,174,330.36

Together with certain unpaid coupons upon each of said bonds.

Said debts also include promissory note of said District payable to D. A. Foley & Co. in the principal amount of $4,000.00

This District proposes and offers to deliver to each and all of the owners and holders of any of the above mentioned bonds cash, or at District's option, the bonds of this District of the "Third Issue of Bonds (Refunding)" of principal amount equal to 24.81¢ per dollar of the principal amount of the bonds of the above mentioned company and districts owned and held by the above mentioned owners and holders. Each of said bonds shall be accompanied by all of its appurtenant coupons which have not heretofore been paid. [101] In the event any such unpaid coupons due prior to May 31, 1933, are missing, the principal amount of cash, or at District's option, refunding bonds to be delivered

by the District shall be reduced in the amount of 20.50¢ for each dollar of the face amount of such missing coupons. In the event any such unpaid coupons due May 31, 1933 or subsequently, are missing, the face amount of such coupons will be deducted from the face amount of such cash, or at District's option, refunding bonds to be delivered by the District.

The District also proposes and offers to deliver to the owner and holder of said $4,000.00 note cash, or at District's option, bonds of said District of said "Third Issue of Bonds (Refunding)" of principal amount equal to 25¢ per dollar of the principal amount of said note. The issuance of said "Third Issue of Bonds (Refunding)" was authorized by vote of the electors of said District at an election held on the 4th day of June, 1934, and by a resolution for the issuance and execution of such bonds adopted by said Board of Trustees at a meeting of Said Board held on the 24th day of July, 1934, as amended, to which resolution reference is hereby made; said refunding bonds shall bear interest at the rate of four per cent (4%) per annum, payable semi-annually on January first and July first, shall be dated July 1, 1934, shall be payable in such funds as are on the respective dates of payment of the principal of and interest on said bonds made legal tender for debts due the United States of America, shall be payable at the office of the County Treasurer of Riverside County, in the County of Riverside, California, or at the National City Bank

of New York in the Borough of Manhattan, City of New York, State of New York, at the option of the holder and shall be in thirty (30) series to mature annually from and including July 1, 1938, to and including July 1, 1967; said bonds and the coupons thereon shall be in substantially the form set out in the resolution last mentioned and may be registerable at the option of the holder as to both principal and [102] interest; said District will provide that the schedule of maturities of said bonds set out in said last mentioned resolution shall be modified so as to provide bonds in such principal amounts as may be necessary to satisfy and comply with such final decree as may be made by the United States District Court in proceedings for the composition of indebtedness of said District under Chapter X of the National Bankruptcy Act.

The District shall also deliver to each and all of the owners and holders of any interest coupons detached from the above-mentioned bonds, cash, or at District's option, the bonds of said District of the "Third Issue of Bonds (Refunding)" of principal amount (a) equal to 20.50 cents for each dollar of face amount of any such detached coupons which came due prior to May 31, 1933, and (b) equal to the face amount of any such detached coupons due May 31, 1933, or subsequently.

The District will provide cash sufficient to pay to each owner and holder of bonds and coupons the difference between the sum of $100.00 (or nearest multiple thereof) and the principal amount of re-

funding bonds required hereunder to be delivered to such person, to the end that such cash and refunding bonds in the principal amount of $100.00 (or multiples thereof) shall be disbursed to such person.

[Endorsed]: Filed Oct. 7, 1938. [103]

[Title of District Court and Cause.]

DISAPPROVAL AND OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Come now respondents James H. Jordan, First National Bank of Tustin, California, a corporation, J. R. Mason, George F. Covell, and L. F. Abadie, and make and file their disapproval of and their objections to petitioner's proposed Findings of Facts and Conclusions of Law in the following respects:

I

That there should be inserted on Line 21 of Page 1 of said proposed findings, after the words "evidence under the petition" the following words: "which said objections were:

1. That there is another action pending in the State Court of California upon the same identical cause of action and demanding substantially the same relief and that that action was commenced and pending under the State law prior to the passing of Chapter X of the Bankruptcy Act, upon which this action is based.

2. That this petitioner filed in this court the same identical action and demanding the same identical relief and involving the same identical parties, based on Section 80 of the [104] Bankruptcy Act some three years ago; that a trial was had and proceedings taken, which ultimately resulted in a judgment of dismissal. That judgment has become final, therefore this proceeding is res judicata.

3. That the plan here proposed is not proposed pursuant to the provision of Chapter X of the Bankruptcy Act, but that said plan was proposed or consummated long prior to the passage of Chapter X of the Bankruptcy Act and that the Reconstruction Finance Corporation is a creditor of petitioner only pursuant to the consummated plan, and is not a creditor of petitioner in the same class as respondents.

And said objections having been duly made by the respondents, counsel for the petitioner conceded that the statement of facts as a basis for the first and second objections was true, except that he stated there was some slight change in the plan as shown by the record. The objections were submitted to the Court,"

II

That there should be stricken from said proposed findings the words "or a greater amount of revenues than will carry out the plan of composition hereafter mentioned." from lines 8 to 10 on page 8.

III

That there should be added to paragraph XVII after the words "and by this reference made a part hereof." on line 11 page 9 of said findings the words "the said Reconstruction Finance Corporation acquired said securities pursuant to certain written contracts made in August 1934, between the said corporation and the petitioner by the purchase of said securities from the original holders thereof, in October 1934, and that they paid to said original holders of bonds of the Palo Verde Mutual Water Company [105] an amount equal to fifty cents on the dollar of principal, and that they paid to the holders of the other securities an amount equal to .248 cents on the dollar of principal, and that in said transaction the Palo Verde Irrigation District paid approximately $1500.00 towards the purchase price thereof, and that substantially all of said purchases, namely over 94% of the securities mentioned in the above plan, were made by the Reconstruction Finance Corporation, pursuant to a plan which was adopted by the petitioner in the year 1934, and was the subject matter of the petition in bankruptcy filed and adjudicated by this court under Section 80 of the Bankruptcy Act of the United States, and was the subject matter of the proceedings under California Statutes of 1937, Chapter 24, which said several proceedings were the basis of the objections made to the commencement of this hearing, as aforesaid."

IV

Strike out the words "and the enforcement of lien or the levy of taxes therefor" from lines 9 and 10, page 11 of said findings.

V

There should be substituted for the last paragraph of page 13, the following: "That their said action Number 28684 filed in said Superior Court on December 29, 1938 gave or made its alternative writ of mandate, requiring petitioner to pay $44,-917.50 from funds in its custody to the petitioners in said action, or to show cause why it had not done so; that petitioner is by the said writ restrained from the disposition of said funds and that the matters involved in said writ have not been finally determined."

VI

After the words "Superior Court" on line 10, page 14 of said findings, insert the words "That in said matter the plan of [106] readjustment of debts varied from the plan of composition herein submitted in that these proceedings made optional with the petitioner whether it will deliver bonds to the creditors or pay them in cash, whereas in the said proceedings in the State Court, the plan provided for delivery of bonds and not for the payment of cash". And further, there should be substituted for the last two sentences of paragraph XVII the following: "That a hearing was held before said Superior Court on the merits of the

said plan of readjustment and after submission of said hearing said Court ordered judgment to be prepared in favor of the Palo Verde Irrigation District on April 23, 1938, and thereafter on Motion of petitioner on June 18, 1938, ordered said submission set aside and said proceeding dismissed without prejudice. That the respondents herein have appealed from said order to the Superior Court of the State of California and said cause is now pending therein and undetermined."

VII

After the words "note and bonds" on line 20, page 15 of said findings insert the words "That by the contracts executed between petitioner and said corporation in August 1934, it is provided that upon repayment to the corporation, at any time, of the amount advanced by said corporation in acquiring said note and bonds, namely 24.81 cents per dollar of principal with 4% interest from date of disbursal by said corporation, that the obligation of the petitioner upon said note and bonds shall cease. That there has been paid to said corporation 4% per annum upon the said amounts disbursed by said corporation from the dates of disbursal, in regular semi-annual payments on or about January 1 and July 1 of each year, commencing January 1, 1935.

VIII

Add to paragraph XXXIII the following: "That said [107] corporation did consent to the plan proposed and which was the subject of the proceedings under Chapter 24 of the California Statutes of

1937, being the aforementioned action Number 29147 in the Superior Court of Riverside County and filed its written consent to the plan proposed in said proceeding as to more than 97% of the securities mentioned in the plan."

IX

Strike out paragraph XXXVI and substitute the following: "That on March 25, 1935 petitioner filed in this Court its petition for readjustment of debts, being case Number 25394-C in bankruptcy, under Chapter IX of said Act of Congress and set up in said petition its plan of readjustment of debts, similar in character to, but varying from the plan of composition proposed herein in that the plan here gives to the petitioner the option to pay cash or deliver bonds to the creditors, whereas in the former plan, bonds only and no cash were to be delivered to the creditors, and in said former petition alleged that the same creditors were affected by said plan of readjustment, except that some of of the creditors there mentioned have since sold their bonds to the Reconstruction Finance Corporation so that there has been in that respect a substitution of creditors, and alleged substantially the same facts as are alleged in this proceeding and prayed for enforcement of a similar plan, varying only as above mentioned.

That said petition filed under said Chapter IX came on regularly for hearing before the undersigned District Judge and evidence was introduced

by the parties and said matter was argued and submitted. That thereafter said District Judge rendered his opinion in favor of petitioner and after submission ordered and approved findings and a decree thereon, but before the entry thereof. The Supreme Court of the United States in the case of Ashton [108] vs. Cameron County Water Improvement District Number 1, rendered its decision. Thereafter being moved solely by the reason of the unconstitutionality of the Act as applied to this cause, the said District Judge entered the dismissal of the petition and which judgment became final, but by the force and *affect* thereof none of the matters in the present petition is res judicata; that this court has the power and jurisdiction to consider and adjudicate each and all of said matters in this proceeding.

X

Strike from paragraph XLI from line 17 to 19 the words: "that respondents are not severally entitled to judgment in said proceeding except for the restraining order issued in this proceeding" and the word "inchoate".

XI

There should be added an additional finding to read as follows: "That at the time the securities held by the Reconstruction Finance Corporation were acquired by said corporation the petitioner owned more than 98% of the area of the land in said district, having taken title thereto for delinquent assessments; that some of the lands in said

district are subject to options upon bonds of other taxing agencies similar to those of petitioner which bonds have not been scaled down in any other proceeding, nor in this proceeding, and some of which bonds are not in default nor in any wise delinquent; that some of the lands in said district are subject to mortgages and to obligations secured by deeds of trust, which have not been required to be scaled down in this or in any other proceeding."

XII

There should be added to said findings of fact the finding to be numbered XLV, reading as follows: "That the respondent James H. Jordan is the owner of bonds of the Palo [109] Verde Joint Levee District of Riverside and Imperial Counties in the sum of $18,000.00, bearing interest at 6½% per annum, payable semi-annually and evidenced by interest coupons. That respondent is the owner of certain interest coupons of said levee district maturing May 1, 1930 and subsequently which are wholly unpaid. That the respondent James H. Jordan is the owner of bonds of the Palo Verde Drainage District in the sum of $3,000.00, bearing interest at 6% per annum payable semi-annually and evidenced by interest coupons. That said respondent is the owner of certain interest coupons of said drainage district maturing July 1, 1930 and subsequently which are wholly unpaid.

That respondent J. R. Mason is the owner of $13,000.00 of bonds of the Palo Verde Irrigation District, together with unpaid interest coupons due

semi-annually commencing with the year 1930, and for each subsequent year thereafter, said interest coupons representing interest upon said bonds at the rate of 6% per annum. That said respondent is also the owner of $14,000.00 of bonds of the Palo Verde Joint Levee District of Riverside and Imperial Counties, California, bearing interest at 6½% per annum, together with unpaid interest coupons due semi-annually commencing with the years 1930 and 1931, and for each year thereafter.

That respondent L. F. Abadie is the owner of $15,000.00 of bonds of the Palo Verde Irrigation District, bearing interest at 6% per annum, together with unpaid interest coupons due semi-annually commencing with the year 1930, and for each year thereafter.

That respondent George F. Covell is the owner of $10,000 of bonds of the Palo Verde Irrigation District, bearing interest at 6% per annum, together with unpaid interest coupons due semiannually commencing with the year 1930 and for each year thereafter.

That respondent First National Bank of Tustin is the owner of $6000.00 of bonds of the Palo Verde Drainage District, bearing [110] interest at 6% per annum, together with unpaid interest coupons due semi-annually commencing with the year 1930, and for each year thereafter.

That the bonds and interest coupons held as aforesaid by said respondents, and each of them are more particularly set forth in proofs of claims filed in this proceeding.

Dated: September 22, 1938.

Respectfully submitted,
W. COBURN COOK
Attorney for Respondents
James H. Jordan, First National Bank of Tustin, California, a corporation, J. R. Mason, George F. Covell and L. F. Abadie

The foregoing objections have been considered by me and overruled.

GEO. COSGRAVE
Dist. Judge.

Oct. 16, 1938. [111]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California, County of Stanislaus—ss.

Esther Mortensen, being first duly sworn, says: That she is a citizen of the United States, resident of the County of Stanislaus, over the age of eighteen years and not interested in the above entitled matter; that on the 22nd day of September, 1938 she placed a full, true and correct copy of the annexed Disapproval and Objections to Findings of Fact and Conclusions of Law in an envelope, duly sealed, and deposited the same in the United States Post Office, at Turlock, California, with postage thereon fully prepaid, addressed to Stewart, Shaw and Murphey, 835 Rowan Building, Los Angeles, California; that there is a regular daily com-

munication by mail between Turlock and Los Angeles.

ESTHER MORTENSEN

Subscribed and sworn to before me this 22nd day of September, 1938

[Seal] GILBERT MOODY

Notary Public in and for the County of Stanislaus, State of California

[Endorsed]: Filed Oct. 7, 1938. [112]

In the District Court of the United States In and For the Southern District of California, Central Division

No. 31992-C

(In Bankruptcy)

In the Matter of Petition of Palo Verde Irrigation District, an Irrigation District, for Composition of Debts.

INTERLOCUTORY DECREE CONFIRMING PLAN OF COMPOSITION OF DEBTS.

The above entitled matter coming on regularly for hearing on the 18th day of July, 1938, before the above entitled Court, Honorable George Cosgrave, District Judge, presiding, upon the merits of the plan of composition of debts proposed by petitioner Palo Verde Irrigation District, and upon the peti-

tion filed by said petitioner, the answer and objections of respondents James H. Jordan, First National Bank of Tustin, California, a corporation, J. R. Mason, George F. Covell and L. F. Abadie, and said petitioner having appeared by Arvin B. Shaw, Jr., of Stewart, Shaw & Murphey, its attorneys, and said respondents having appeared by W. Coburn Cook, their attorney and said respondents having made certain objections to the jurisdiction of the Court and objections to the introduction of any evidence under the petition, which objections were, for good cause, overruled, with exceptions allowed to respondents, and it appearing that notice of this hearing has been regularly given, in accordance with Chapter X of the National Bankruptcy Act and the orders of this Court, and that this court has jurisdiction to hear said petition on the merits, and said hearing having been ordered to proceed before said Court, and evidence having been offered and introduced on said 18th day of July 1938, on behalf of the parties appearing, and said matter having been submitted on memoranda of authorities to be submitted by the parties and such memoranda having been submitted, and the Court having this day made and filed its Findings of Fact and Conclusions of Law in said matter, of even date herewith and being fully advised in the premises; [113]

Now, Therefore, It Is Ordered, Adjudged and Decreed as follows:

1. That said plan of composition of debts of petitioner, Palo Verde Irrigation District, an irriga-

tion district, be and the same is hereby approved and confirmed. That a true copy of said plan, is attached to this decree, marked "Exhibit A", and by reference made a part hereof.

2. That the claim filed by Reconstruction Finance Corporation, as owner of the promissory note and bonds aggregating in principal amount $4,043,-730.36, is hereby approved and allowed.

3. That all of the outstanding bonds and other indebtedness of petitioner, as itemized and enumerated in schedules attached to the petition in this cause marked Exhibits "B" and "C" and made a part thereof are of one and the same class, are payable without preference out of funds derived from the same source or sources and are hereby allowed as obligations of the petitioner, whether presented or not, and that the several holders thereof are entitled to participate ratably in the distribution of the funds in accordance with said plan of composition and the decrees of this court, as hereinafter provided.

4. That, in order to provide the sum necessary to pay the incidental expenses and to pay for the outstanding bonds issued or assumed by the petitioner as contemplated by said plan of composition and the orders of this court, petitioner is hereby authorized forthwith duly to issue and sell its refunding bonds of the "Third Issue of Bonds (refunding)" to the Reconstruction Finance Corporation in amounts required to pay such incidental expenses and to pay the sum equal to 24.81 cents on the dollar of the

principal amount of its outstanding bonds (not purchased by the Reconstruction Finance Corporation), and to re-pay to Reconstruction Finance Corporation the money expended by it for the purchase of the old bonds issued or assumed by petitioner as herein provided, with interest on all disbursements for such purposes at four per cent per annum from date thereof. That the old bonds so purchased by the Reconstruction [114] Finance Corporation will thereupon be cancelled and returned to petitioner and that each and all of said refunding bonds so issued or sold by the petitioner to the Reconstruction Finance Corporation, as provided herein, are hereby declared to be valid obligations of petitioner and shall not at any time be affected by said plan of composition or these proceedings.

5. That during the pendency of these proceedings the Reconstruction Finance Corporation is authorized to purchase from the holders thereof any of the outstanding bonds issued or assumed by petitioner upon the following terms and conditions, to-wit: The Reconstruction Finance Corporation to pay the sum of 24.81 cents on each dollar of principal amount of said outstanding bonds, paying nothing on interest and deducting from said amounts for missing coupons, as provided in this decree for payment of the outstanding bonds by the disbursing agent; then when purchased, as provided in this paragraph, the old bonds shall be delivered to the Reconstruction Finance Corporation and held by it as security for the funds furnished by it for such

purpose, with interest thereon at four per cent per annum, until such time as it received from petitioner its refunding bonds for such disbursements and interest, or petitioner may pay such interest and deliver bonds for the principal.

6. That the petitioner deposit with Security-First National Bank of Los Angeles, Corporate Trust Department, whose address is Sixth and Spring Streets, Los Angeles, California, as disbursing agent of this court, the sum necessary to pay the holders of its outstanding bonds, other than bonds which shall have been purchased by the Reconstruction Finance Corporation, as herein provided, 24.81 cents on the dollar of the unpaid principal amount thereof, excluding all interest due or to become due, and the holders of said bonds be and they are hereby required to deposit said bonds, with all unpaid interest coupons attached, with the disbursing agent before payment is made as herein provided; that if any bonds are so deposited [115] with any unpaid interest coupons due before May 31, 1933, missing, the disbursing agent shall make a deduction from the amount to be paid therefor, a sum equal to 20.50 cents for each dollar of the face amount of such missing coupons, and if any bond be presented with any unpaid interest coupons maturing on or after May 31, 1933 missing, deduction shall be made from the amount to be paid therefor equal to the full face value of such missing coupons. For any interest coupons detached from the above mentioned bonds, the disbursing agent

shall pay 20.50 cents for each dollar of face amount of any such detached coupons which came due previous to May 31, 1933, and the face amount of any such detached coupons due May 31, 1933, or subsequently.

7. After making payment for all bonds and coupons of Palo Verde Mutual Water Company, said disbursing agent shall cancel and retain said bonds and coupons and shall reconvey, in accordance with law and the deed of trust securing said bonds, the property held by it as trustee under said deed of trust. When payment shall have been made by the disbursing agent for the promissory note mentioned in said plan, said disbursing agent shall cancel said note and surrender it to petitioner. When payment shall have been made for any bonds and coupons affected by said plan issued by Palo Verde Joint Levee District of Riverside and Imperial Counties, California, Palo Verde Drainage District and Palo Verde Irrigation District, said disbursing agent shall surrender such bonds and coupons to the County Treasurer of Riverside County, California, for cancellation.

8. That, in the event any of the old bonds and interest coupons are not surrendered to the disbursing agent within thirty days after receipt by such agent of the money with which to redeem the same, then the proportionate sum to which the holders thereof may be entitled under the plan of composition and the terms of this decree shall be paid by the disbursing agent to the Clerk of this

Court as Registrar and thereafter paid by him to the holders of such bonds, in accordance with the provisions of this decree and such further [116] decrees of this court as are made in reference to the payment of such bonds.

9. That the Clerk of this Court shall cause to be published in the "Los Angeles Daily Journal" and the "Palo Verde Valley Times", newspapers published in Los Angeles and Blythe, California, respectively, for two successive issues, notice to the holders of the outstanding bonds issued and assumed by the petitioner, directing every holder thereof to deposit any and all bonds and coupons issued or assumed by the petitioner with the disbursing agent within the thirty day period above provided or thereafter with the Clerk of this Court for payment, in accordance with this decree, or be forever barred from claiming or asserting, as against petitioner or any individually owned property located within petitioner or the owners thereof, any claim or lien arising out of said bonds or coupons; provided, however, that nothing contained herein shall preclude the Reconstruction Finance Corporation from asserting its rights and claims under the old bonds so purchased by it to the extent and amount so expended in acquiring the same, with interest thereon at the rate of four per cent per annum, until petitioner shall have delivered to the Reconstruction Finance Corporation its refunding bonds in form satisfactory to said Reconstruction Finance Corporation in the aggregate

principal amount equal to the money so expended in acquiring such old bonds, with interest.

10. That after the expiration of thirty days from the date of receipt of the funds to carry out the terms of said plan of composition and retiring the outstanding indebtedness as provided in said plan, the disbursing agent shall make full and complete report to this Court for confirmation, including an itemized statement of all receipts and disbursements, together with a list of old bonds outstanding at the time of such report, showing serial number of and amount of each outstanding unpaid bond.

11. That respondents herein, James H. Jordan, First National [117] Bank of Tustin, California, George F. Covell, J. R. Mason, L. F. Abadie, and W. Coburn Cook, their attorney, and each of them, and all other holders of securities affected by said plan and the servants, agents, attorneys and employees of them, and each of them, and all persons acting under them or on their behalf, or claiming so to act, be and they are hereby enjoined and restrained, until the entry of said final decree or the further order of this Court, from in any manner, directly or indirectly, or at all, commencing or continuing to prosecute or further any suits, actions, or proceedings upon, on account of, or in respect of said indebtedness affected by said plan, or any of said indebtedness, and from taking or prosecuting any acts, measures, steps or proceedings looking to the enforcement of said indebtedness or any thereof, or the enforcement of any lien, or the enforcement

or levy of taxes for the payment of said indebtedness, or any thereof, and, in particular, said persons, and each of them, are enjoined and restrained from prosecuting or furthering as against any defendants or respondents therein named any of those certain actions, proceedings or appeals now pending in the Superior Court of the State of California, in and for the County of Riverside, and in the Justice's Court of Riverside Township, in said County, and in the District Court of Appeal of the State of California, in and for the Fourth Appellate District, and in the Supreme Court of said State, mentioned in the Court's Findings of Fact, herein this day filed.

And the suits, proceedings and appeals now pending hereinabove referred to, and each of them, are stayed, pending the entry of final decree herein, and each of said persons is hereby enjoined and restrained, pending the entry of final decree herein, from attempting in any manner, whether by legal proceedings or otherwise, the enforcement or collection of any claim, judgment or lien respecting any indebtedness affected by said plan, which he may now have against petitioner, said Levee District or said Drainage District, or against any of the lands situate within petitioner's boundaries, or against [118] any of the owners of such lands. That the costs and expenses of this proceeding accrued to date hereof be taxed against petitioner.

Let exceptions be reserved to respondents.

Done, ordered and decreed in the above entitled Court in Chambers, in the City of Los Angeles, Cali-

fornia, in said Southern District of California, this Oct. 6, 1938.

GEO. COSGRAVE
District Judge

Sept. 22, 1938.

Approved as to form under Rule 8:

W. COBURN COOK,
Attorneys for Respondents

(Received Sept. 19, 1938, 9 A.M.)

Approved:

SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES
By..
Its Vice-President [119]

EXHIBIT "A"

PLAN OF COMPOSITION
PALO VERDE IRRIGATION DISTRICT

Palo Verde Irrigation District, being unable to meet the debts as they mature, desires to effect the following plan of composition:

Said debts consist principally of issued, outstanding and unpaid bonds issued or assumed by said District, to-wit, bonds issued by the following entities and in the amounts hereinafter set opposite the names of such entities, to-wit:

Palo Verde Mutual Water Company, Principal Amount	$170,000.00
Palo Verde Joint Levee District of Riverside and Imperial Counties, California, first issue, Principal Amount	$911,951.86
Palo Verde Joint Levee District of Riverside and Imperial Counties, California, second issue, Principal Amount	$304,378.50
Palo Verde Drainage District, Principal Amount	$850,000.00
Palo Verde Irrigation District, first issue, Principal Amount	$1,725,000.00
Palo Verde Irrigation District, second issue, Principal Amount	$ 213,000.00
Total,	$4,174,330.36

Together with certain unpaid coupons on each of said bonds.

Said debts also include promissory note of said District payable to D. A. Foley & Co. in the principal amount of 4,000.00

This District proposes and offers to deliver to each and all of the owners and holders of any of the above mentioned bonds cash, or at District's option, the bonds of this District of the "Third Issue of Bonds (Refunding)" of principal amount equal to 24.81¢ per dollar of the principal amount of the bonds of the above mentioned company and districts owned and held by the above mentioned owners and holders. Each of said bonds shall be accompanied by all of its appurtenant coupons which have not heretofore been paid. [120] In the event any such unpaid coupons due prior to May 31, 1933, are missing, the principal amount of cash, or at District's option, refunding bonds to be de-

livered by the District shall be reduced in the amount of 20.50¢ for each dollar of the face amount of such missing coupons. In the event any such unpaid coupons due May 31, 1933, or subsequently, are missing, the face amount of such coupons will be deducted from the face amount of such cash, or at District's option, refunding bonds to be delivered by the District.

The District also proposes and offers to deliver to the owner and holder of said $4,000.00 note cash, or at District's option, bonds of said District of said "Third Issue of Bonds (Refunding)" of principal amount equal to 25¢ per dollar of the principal amount of said note. The issuance of said "Third Issue of Bonds (Refunding)" was authorized by vote of the electors of said District at an election held on the 4th day of June, 1934, and by a resolution for the issuance and execution of such bonds adopted by said Board of Trustees at a meeting of said Board held on the 24th day of July, 1934, as amended, to which resolution reference is hereby made; said refunding bonds shall bear interest at the rate of four per cent (4%) per annum, payable semi-annually on January first and July first, shall be dated July 1, 1934, shall be payable in such funds as are on the respective dates of payment of the principal of and interest on said bonds made legal tender for debts due the United States of America, shall be payable at the office of the County Treasurer of Riverside County, in the County of Riverside, California, or at the National City Bank of

New York in the borough of Manhattan, City of New York, State of New York, at the option of the holder and shall be in thirty (30) series to mature annually from and including July 1, 1938, to and including July 1, 1967; said bonds and the coupons thereon shall be in substantially the form set out in the resolution last mentioned and may be registerable at the option of the holder as to both principal and [121] interest; said District will provide that the schedule of maturities of said bonds set out in said last mentioned resolution shall be modified so as to provide bonds in such principal amounts as may be necessary to satisfy and comply with such final decree as may be made by the United States District Court in proceedings for the composition of indebtedness of said District under Chapter X of the National Bankruptcy Act.

The District shall also deliver to each and all of the owners and holders of any interest coupons detached from the above-mentioned bonds, cash, or at District's option, the bonds of said District of the "Third Issue of Bonds (Refunding)" of principal amount (a) equal to 20.50 cents for each dollar of face amount of any such detached coupons which came due prior to May 31, 1933, and (b) equal to the face amount of any such detached coupons due May 31, 1933, or subsequently.

The District will provide cash sufficient to pay to each owner and holder of bonds and coupons the difference between the sum of $100.00 (or nearest multiple thereof) and the principal amount of re-

funding bonds required hereunder to be delivered to such person, to the end that such cash and refunding bonds in the principal amount of $100.00 (or multiples thereof) shall be disbursed to such person.

[Endorsed]: Filed Oct. 7, 1938. [122]

[Title of District Court and Cause.]

NARRATIVE STATEMENT OF EVIDENCE

Hon. George Cosgrave, Judge Presiding

Stewart, Shaw & Murphey, by Arvin B. Shaw, Jr., Esq., appearing for petitioner, Palo Verde Irrigation District, and W. Coburn Cook, Esq., appearing for the respondents.

This cause came on for hearing upon the petition of the Palo Verde Irrigation District for composition of debts and the answer and objections of the several objecting creditors who were described as respondents, on July 18, 1938.

The following is a narrative statement of the evidence adduced at said hearing:

It was stipulated between counsel that a certain [123] stipulation entered into under date of June 20, 1938, and filed herein on June 29, 1938, whereby it was stipulated that the evidence in this proceeding should be adduced by filing with the court a transcript of proceedings at a prior hearing together with the exhibits there submitted, in lieu

of the presentation of witnesses and the taking of their testimony again orally, be now extended to cover all the respondents for whom Mr. Cook appeared.

Whereupon petitioner offered in evidence an original reporter's transcript of testimony taken in the Superior Court of the State of California in and for the County of Riverside in case 29147 in that court, the trial in said Superior Court action commencing on November 17, 1937, together with exhibits introduced in that case being all of the exhibits introduced except Exhibits 1 and 2. The transcript was marked as petitioner's Exhibit 1.

Whereupon respondents by Mr. Cook, objected to the introduction of this or any evidence upon the grounds that the court did not have jurisdiction to proceed with the hearing of the cause because of the following facts:

1. On April 20, 1937 the district filed a petition in the Superior Court of Riverside County under Chapter 24 of the Statutes of 1937 of the State of California. This petition was filed for readjustment of the same indebtedness mentioned in the present petition, was substantially identical with the present petition and petitioner will rely on the present case on the evidence and exhibits used in the former case.

The former case was fully tried and submitted for decision and the Superior Court on April 23, 1938 rendered a written opinion that the plan was fair and directed the district to prepare findings

and judgment. In June of 1938, the district moved the Superior Court for an order vacating the submission of the case and for dismissal without prejudice, which order was granted. Respondents [124] have appealed from said order. Respondents urge the former case as a bar, as a prior action pending.

2. The district in 1935 had a proceeding pending in this court under Section 80 of the Bankruptcy Act. This proceeding was tried and submitted and the Court came to the conclusion that the plan should be approved. The district submitted findings. The Supreme Court of the United States held Section 80 unconstitutional. This Court on December 8, 1936, filed a judgment of dismissal on the sole ground that Section 80 was unconstitutional. The petition and plan and parties in the case under Section 80 and those in the present case are substantially identical except that in the present case the district reserves the right to pay in cash or bonds, whereas the former plan only offered bonds. The Reconstruction Finance Corporation in the former proceeding and in this proceeding claimed substantially the same bonds. Respondents urge res judicata.

3. The plan shows on its face that the Reconstruction Finance Corporation has long since consented to the plan and the plan was one that had been proposed, conceived and carried out, out of court.

Mr. Shaw, on behalf of petitioner, agreed to the facts recited by Mr. Cook under the first two of the

foregoing three points but did not accept Mr. Cook's statement of facts under the third point.

Whereupon, petitioner's Exhibit 1 was admitted in evidence. Exhibit 1 was the reporter's transcript of testimony taken as aforesaid in the case of "In the Matter of the Petition of the Palo Verde Irrigation District, an irrigation district for adjustment of Debts," in the Superior Court of the State of California in and for the County of Riverside in November 1937, together with the exhibits there submitted except Exhibits 1 and 2. Said Exhibit 1 comprised the following evidence: [125]

The petitioner first offered in evidence Exhibit 1 (in said case, being the first of the exhibits attached to said transcript of testimony) which was a purported consent to the plan of readjustment, dated April 7, 1937, and which was admitted for the limited purpose of showing the consent of the Reconstruction Finance Corporation to the plan of readjustment of indebtedness.

Exhibit 3 was attached to the transcript of the Superior Court proceeding, and this Exhibit was a copy of the California Districts Securities Commission, No. 13, dated March 19, 1937, approving the plan of readjustment of debts as set forth in the State Court petition.

RALPH SIEGFRIED

was called as a witness on behalf of the petitioner and testified that he had been a securities dealer since 1925 in the Los Angeles office of a New York company specializing in irrigation district bonds. That schedules introduced in evidence as Exhibit 4 correctly showed actual transactions in the purchase and sales of bonds [126] of the Palo Verde Irrigation District, Palo Verde Joint Levee District, and Palo Verde Drainage District for the period from 1930 to November 1, 1934. Over the objection of respondents that they were incompetent and immaterial, three schedules were introduced in evidence as Exhibit 4. The first schedule showed transactions of purchases and/or sales of the Palo Verde Joint Levee District bonds. The second one, of Palo Verde Drainage District bonds, and the third one of Palo Verde Irrigation District bonds, all of them covering the period from 1931 to 1934 and all of them compiled from records in the company with which the witness was connected.

The schedules show selling prices, which were "Flat", i.e., were regardless of accumulated unpaid interest. They were the highest prices that could be obtained for the bonds. Exhibit 4 shows that the bonds sold in 1930 and 1931 at 10 to 14 per cent of principal, gradually declined to 2 about the beginning of 1933 and then slowly increased to 21½ on November 1, 1934, after which there were no sales. Twenty-two sales listed were at prices from 2 to 5.

(Testimony of Ralph Siegfried.)

The transactions took place during the economic depression; there are plenty of stocks and bonds that sold for little or nothing in 1932 that today are worth close to par. There was an established, but not listed, market value for these bonds.

L. C. MEYER

was called as a witness for petitioner and testified that he was an assistant cashier for the Federal Reserve Bank of San Francisco, Los Angeles branch, which handled certain transactions in Palo Verde bonds as custodian and fiscal agent for Reconstruction Finance Corporation; that copies of communications introduced in evidence as Exhibit 5 were communications received from the Reconstruction Finance Corporation by the Federal Reserve Bank.

Exhibit 5 was introduced in evidence for the limited [127] purpose of showing the scope of authority of the Federal Reserve Bank as the agent of the Reconstruction Finance Corporation, and consisted of a copy of a letter dated October 6, 1934, copies of memoranda, and certain schedules, all as follows:

(Testimony of L. C. Meyer.)

PETITIONER'S EXHIBIT NO. 5

Reconstruction Finance Corporation
Washington

October 6, 1934

Federal Reserve Bank of San Francisco
San Francisco, California

Re: Palo Verde Irrigation District,
Docket No. Ref. 92

Gentlemen:

This Corporation has authorized a loan of not to exceed [128] the sum of $1,039,423.00, for the purpose of enabling Palo Verde Irrigation District, a public corporation, organized under the laws of the State of California, to reduce and refinance its outstanding bonded indebtedness.

We now wish to purchase outstanding bonds of the District (either issued by the District or assumed by it) in an aggregate principal amount of not to exceed $4,174,330.36 on the basis of a payment at the rate of 24.81 cents for each dollar principal amount of the bonds so purchased and to also purchase a $4,000.00 promissory note executed by Palo Verde Irrigation District and now held by Bank of America at Los Angeles, which note is to be [129] purchased at the rate of 25 cents for each dollar of principal due therefor.

We are forwarding a copy of this letter to L. A. Hauser, President of the District, who will make arrangements for the delivery of the securities to be purchased.

(Testimony of L. C. Meyer.)

We are sending the ribbon copy of this letter, accompanied by the exhibits hereinafter set forth, to your Los Angeles Branch and direct said Branch to purchase the bonds and note upon the following terms and conditions.

(1) Provided there is presented for payment at least $3,931,130.36 principal amount of said bonds together with the $4,000.00 note, making a total of $3,935,130.36. If such "Old Securities" are not presented for payment your Branch will refuse to make any disbursement and so advise this Corporation.

(2) Your Branch will in no event purchase bonds in excess of the principal amount of $4,174,330.36 nor shall your Branch purchase bonds of different issues in excess of the following amounts:

Palo Verde Irrigation District, 1st issue	$1,725,000.00
Palo Verde Irrigation District, 2nd issue	213,000.00
Palo Verde Drainage District	850,000.00
Palo Verde Mutual Water Company	170,000.00
Palo Verde Joint Levee District, 1st issue	911,951.86
Palo Verde Joint Levee District, 2nd issue	304,378.50
Total	$4,174,330.36

(Testimony of L. C. Meyer.)

(3) The bonds which will be presented for purchase are as follows:

(a) Bonds of the Palo Verde Irrigation District, First Issue, of the aggregate principal amount of not less than $1,605,000.00. Said bonds are dated September 1st, 1925, are of a $1,000.00 denomination and bear interest at the rate of six per cent per annum, payable January 1st and July 1st of respective years. The number and maturity dates of each of the bonds of this issue to be delivered to your Branch shall correspond to that set forth in Exhibit "A". Except as to serial number, maturity date and attached interest coupons, each of said bonds shall correspond as to form, text and signature with the photostatic copy of Bond No. 1, marked Exhibit "B". These bonds will be accompanied by coupons as set forth in Exhibit "A".

(b) Palo Verde Irrigation District Bonds, Second Issue, of the aggregate principal amount of not less than $208,000.00 said bonds being dated September 1st, 1925, are of a $1000.00 denomination and bear interest at the rate of six per cent per annum, payable January 1st and July 1st of the respective years. The number and maturity dates on each of the bonds of this issue to be delivered to your Branch shall correspond with that set forth in [130] Exhibit "C". Except as

(Testimony of L. C. Meyer.)

to serial number, maturity date and attached interest coupons, each of said bonds shall correspond as to form, text and signature with the photostatic copy of Bond No. 1, marked Exhibit "D". These bonds will be accompanied by coupons as set forth in Exhibit "C".

(c) Palo Verde Drainage District Bonds, 1st issue, in the aggregate principal amount of not less than $805,500.00, which said bonds are dated December 1st, 1921, and are of the denomination of $500.00 and bear interest at the rate of six per cent per annum, payable July 1st and January 1st of the respective years. The number and maturity dates of each of the bonds of this issue to be delivered to your Branch shall correspond to that set forth in Exhibit "E". Except as to serial number, maturity date and attached interest coupons, each of said bonds shall correspond as to form, text and signature with the photostatic copy of Bond No. 1, marked Exhibit "F". The bonds will be accompanied by coupons as set forth in Exhibit "E".

(d) Palo Verde Mutual Water Company, First Mortgage Serial Bonds of an aggregate principal amount of not less than $162,300.00, which said bonds are dated February 1st, 1916, are in denominations of $1,000.00, $500.00, $100.00 and bear interest at the rate

(Testimony of L. C. Meyer.)

of six per cent per annum, payable August 1st and February 1st of the respective years. The number, maturity dates and principal amount of each of the bonds of this issue to be delivered to your Branch, shall correspond to that set forth in Exhibit "G". Except as to serial number, maturity date, principal and attached interest coupons, each of said bonds shall correspond with the form, text and signature of the photostatic copy of Bond No. 243, marked Exhibit "H". The bonds will be accompanied by coupons as set forth in Exhibit "G".

(e) Palo Verde Joint Levee District Bonds, First Issue, of an aggregate principal amount of not less than $869,951.86, which said bonds are dated May 1st, 1918, each of the denomination of $1,000.00, except Bond No. 1286 which is of the denomination of $951.86, and bear interest at the rate of six per cent per annum, payable on May 1st and November 1st of the respective years. The number and maturity dates of each of the bonds of this issue to be delivered to your Branch shall correspond to that set forth in Exhibit "I". Except as to serial number, principal, maturity date and attached interest coupons, each of said bonds shall correspond with the form, text and signature on the photostatic copy of Bond No. 354 marked Exhibit

(Testimony of L. C. Meyer.)

"J". The bonds will be accompanied by coupons as set forth in Exhibit "I".

(f) Palo Verde Joint Levee District, Second Issue, in the aggregate principal amount of not less than $280,378.50. Said bonds are dated November 1st, 1922, and are of the denomination of $1,000.00, except bond No. 372, which is of the denomination [131] of $378.50, and bear interest at the rate of 6½% per annum, payable May 1st and November 1st, of the respective years. The number and maturity dates on each of the bonds of this issue to be delivered to your Branch, shall correspond to that set forth in Exhibit "K". Except as to serial number, maturity date principal and attached interest coupons, each of said bonds shall correspond as to form, text and signatures with the photostatic copy of Bond No. 66, marked Exhibit "L". The bonds will be accompanied by coupons set forth in Exhibit "K".

(4) The note to be purchased is one executed by Palo Verde Irrigation District, dated February 1, 1930, payable to the order of D. A. Foley & Co., and assigned to Bank of America of Los Angeles. Said note is for the principal sum of $4,000.00, is payable January 2, 1932, and bears interest at the rate of 7% per annum. This note is to be endorsed, "without recourse" to this Corporation. In the event said note is

(Testimony of L. C. Meyer.)

not presented your Branch will refuse any disbursement and so advise this Corporation.

(5) A certificate will be presented to your Branch by the Treasurer of Palo Verde Irrigation District, setting forth which coupons have been paid on the various bonds and your Branch is directed to check the coupons attached to the respective bonds as set forth in the various exhibits, with the information received from the Treasurer of said District. The information relative to the coupons accompanying the respective bonds has been furnished by the officers of Palo Verde Valley Properties, Inc., and some discrepancies may appear when the bonds and coupons are checked. This Corporation is desirous of seeing that all unattached coupons have been presented for payment and paid. No credit will be allowed for coupons which fell due prior to the coupons as set forth in the exhibits attached hereto, even though such additional coupons accompany the respective bonds. Should it develop that any coupons are missing, which fell due prior to the coupon as set forth in the respective exhibits, or prior to May 31st, 1933, no deduction will be made from the loan authorized provided it further appears that said coupons have been paid so that they are no longer an obligation against the District. If such coupons are missing and have not been paid, a deduction of 20.50 cents

(Testimony of L. C. Meyer.)

for each dollar face amount of such missing coupons will be made from the payment for the respective bonds. In the event that any coupons due May 31st, 1933, or subsequently are missing, the face amount of such coupons will be deducted from the amount to be paid for the respective bonds. If any such changes or corrections are apparent, your Branch is authorized to make them accordingly and to make a deduction as above stated. We have prepared a list marked Exhibit "M", setting forth the missing coupons from respective bonds which said list has been prepared to assist in checking such missing coupons. Deductions from the purchase price of the respective bonds will be made for these coupons as hereinabove provided. This list also has been prepared from information furnished this Corporation and some discrepancies [132] may appear. Your Branch is authorized to make such changes as are apparent, as for instance should a coupon be presented which is reported missing, then your Branch may disregard our record as to such coupon.

(6) If any bonds are presented for purchase in addition to those enumerated in the various exhibits your Branch is authorized to purchase said bonds on the basis hereinabove set forth provided the President or Secretary of Palo Verde Irrigation District furnish your Branch

(Testimony of L. C. Meyer.)

with a certificate stating that said bonds are genuine outstanding bonds of a particular issue and provided the total amount of bonds to be purchased of any particular issue does not exceed the amounts set forth above.

(7) The Secretary of the District shall furnish to your Branch two counterparts of a certificate certifying that all the bonds presented for payment are the valid outstanding obligations of said District, and that the same have not been heretofore paid and canceled. The signature of the Secretary on said counterparts shall be certified to by an officer of a bank which is a member of the Federal Reserve System of your District. Each of said counterparts shall correspond to Exhibit "N".

(8) There will be delivered to your Branch a note in the sum of $90,000.00 executed by the District in favor of Palo Verde Mutual Water Company. The note is dated October 8, 1928, bears interest at the rate of 6% per annum and fell due April 8, 1929. No payment is to be made for this note, but it is to be marked paid and surrendered. If this note is not surrendered your Branch will refuse any disbursement and so advise this Corporation.

Upon receipt of the foregoing documents your Branch will check the genuineness of the signatures appearing on each of the bonds and will also check the form and text of the bonds with that of the re-

(Testimony of L. C. Meyer.)
spective photostatic copies attached as exhibits. Your Branch will also check the serial number, principal amounts and maturities and ascertain that proper coupons are attached to each bond evidencing interest payments as set forth in the respective exhibits showing coupons attached to each bond.

Your Branch will also check all signatures on the bonds for genuineness, by comparing the same with the signatures appearing on the respective photostatic copies of bonds and will check the genuineness of the seal appearing thereon by comparing the same with a certificate which will be furnished it by the Secretary of the Palo Verde Irrigation District, which said certificate should have impressed upon it the seal of the particular District or Company as the case may be, certified to as to genuineness by the Secretary of Palo Verde Irrigation District and should bear a statement by said Secretary that the genuine signatures of the proper officers appear on the photostatic copy of each of the bonds. The signature of the officer so executing said certificates should be certified to by an officer of a bank which is a member of the Federal Reserve System of your District.

Upon being satisfied that the bonds and accompanying documents delivered to it comply with the foregoing instructions [133] your Branch will make payment by check, payable to the order of Palo Verde Valley Properties Inc., in an amount representing payment at the rate of 24.81 cents for

(Testimony of L. C. Meyer.)

each dollar principal amount of the bonds presented for purchase, unless deductions are made from any particular bond for missing coupons as hereinabove stated. Your Branch is authorized to reimburse itself for such payment by drawing against this Corporation's Account with the Treasury of the United States, Symbol 93-300.

In no event shall the total amount paid out exceed the sum of $1,036,923.00. If the bonds and note presented call for payment of more than this sum your Branch will refuse to make any disbursement and so advise this Corporation.

We request that your Branch hold the aforesaid bonds and one copy of each of the other documents referred to herein as Custodian for this Corporation and collect interest on and principal of such bonds in such amounts and at such times as hereinafter authorized by this Corporation.

We also request that upon closing this transaction your Branch forward to us one copy of each of the documents, other than the bonds, received at such closing, together with a statement showing the amount disbursed, indicating therein the principal amount of the bonds of each issue so purchased, together with any deductions which may have been made for missing coupons.

Yours very truly,

(Signed) H. A. MULLIGAN,

H. A. MULLIGAN,

Treasurer.

(Testimony of L. C. Meyer.)

Copies to:

Los Angeles Branch
Reserve Bank of San Francisco,
Los Angeles, California.

L. A. Hauser, President,
Palo Verde Irrigation District,
Box #930, Arcade Station,
Los Angeles, California.

Messrs. O'Melveny, Tuller & Myers,
Attorneys at Law,
433 South Spring Street,
Los Angeles, California.

Then follows:

Memorandum dated October 25, 1934, and copy of translation of telegram dated October 18, 1934, both from the Reconstruction Finance Corporation, Washington, D. C., to the Federal Reserve Bank and both giving certain instructions as to certificates showing *genuiness* of signatures of officers executing [134] various bonds and instructions as to identification of bonds.

Translation of telegram received, as follows:

From: RF Washington 110pm 10/15/34
FRB SF Copy FRB

To: Los Angeles

Referring to letter Oct 6th Palo Verde Irrigation District change rate of interest to six and one half per cent in paragraph E page three. Assistant Secretary may execute required certificates. Note held by Palo Verde Mutual Water Co to be surrendered

(Testimony of L. C. Meyer.)

to Palo Verde Irrigation District. Pay one thousand dollars for note of four thousand held by Bank of America at Los Angeles. Accept certificate from Security First Natl Bank of Los Angeles to show which coupons have been paid on bonds Palo Verde Mutual Water Company and certificate from County Treasurer Riverside County as ex officio treasurer of Palo Verde Irrigation District to show which coupons have been paid on other bond issues. Make check payable to Security First Natl Bank of Los Angeles as depositary in place of Palo Verde Valley properties Incorporated. T dash One ticket in amount of total disbursements should be submitted with T dash nine report. Attach memo of closing to ticket describing documents received. You are authorized to proceed on this basis, other terms and conditions previous authorization(s) remaining unchanged.

11:40 am MULLIGAN.

Then follows schedules of deposited bonds, photostatic copies of bonds, schedules of missing coupons and bonds, and form of certificate for execution by the secretary of the Palo Verde Irrigation District as to the validity of bonds which the Reconstruction Finance Corporation acquired through the Los Angeles Branch Federal Reserve Bank of San Francisco.

Mr. L. C. Meyer further testified that following the receipt of the file of papers introduced as Exhibit 5 from the Reconstruction Finance Corpo-

(Testimony of L. C. Meyer.)
ration he proceeded on behalf of his bank to get in touch with the Security First National Bank, which, he was informed, was trustee for bondholders. Subsequently the Security Bank brought to his bank bonds held in that capacity and certain written instruments and he turned over money to the Security Bank after receiving those bonds. This transaction took place about October 31, 1934. A letter dated October 31, 1934, introduced in evidence as part of Exhibit 6 reflects approximately the amount of face value of bonds received and the amount of money paid by the Federal Reserve Bank. [135]

Exhibit 6 consisted of two letters reading as follows:

PETITIONER'S EXHIBIT NO. 6

(Emblem)

Security-First National Bank of Los Angeles
Savings Commercial Trust
Head Office of Trust Department
Sixth and Spring Streets
Los Angeles, California
October 18, 1934

Reference: Trust No. C-6070

Federal Reserve Bank of San Francisco
Los Angeles Branch
Los Angeles, California

Gentlemen:

We herewith hand you in trust and subject to our further instructions $964,000.00 principal amount of Palo Verde Irrigation District Six Per Cent Bonds

(Testimony of L. C. Meyer.)
with certain coupons thereto attached all as more particularly described on the attached list of 21 pages.

These bonds and coupons are handed to you at this time in order that you may verify them in connection with instructions which you have received from the Reconstruction Finance Corporation regarding the refunding of Palo Verde Irrigation District's various bond issues.

Please give our messenger a trust receipt for the above bonds and coupons for safekeeping subject to our further instructions. Additional blocks of bonds of other Palo Verde issues will be handed you as soon as you are able to receive them.

Yours very truly,

(Signed) C. W. FARIES

BF — Assistant Secretary

(Emblem)

Security-First National Bank of Los Angeles

Savings — Commercial — Trust

Head Office of Trust Department

Sixth and Spring Streets

Los Angeles, California

October 31, 1934

Reference: Trust No. C-6070 [136]

Los Angeles Branch
Federal Reserve Bank of San Francisco
Los Angeles, California

Gentlemen:

As stated in our previous correspondence, we have heretofore handed you $3,956,230.36 par value of

(Testimony of L. C. Meyer.)

bonds of various so-called Palo Verde issues together with certain coupons pertaining to said bonds. We now herewith return to you your receipts for said bonds and coupons as follows:

Oct. 11, 1934 No. 10968 for $444,678.50 p. v. bonds.
Oct. 15, 1934 No. 10969 for $314,500.00 p. v. bonds.
Oct. 16, 1934 No. 10971 for $491,000.00 p. v. bonds.
Oct. 17, 1934 No. 10972 for $871,951.86 p. v. bonds.
Oct. 18, 1934 No. 10973 for $964,000.00 p. v. bonds.
Oct. 19, 1934 No. 10975 for $868,100.00 p. v. bonds.
Oct. 26, 1934 No. 10982 for $ 2,000.00 p. v. bonds.
Oct. 26, 1934 No. 10982 for $ 4,000.00 Note
Oct. 30, 1934 letter " 4 coupons
Oct. 31, 1934 " " 10 coupons
" " " " " 7 "

You are hereby authorized and instructed to use all of the bonds and coupons represented by the above described receipts in accordance with instructions of the Board of Trustees of Palo Verde Irrigation District when you are ready, able, and willing to pay us the sum of $981,819.15.

Please acknowledge receipt of these instructions and the enclosures on the carbon copy of this letter provided for that purpose.

Yours very truly,

C. W. FARIES

Assistant Secretary

(Testimony of L. C. Meyer.)

The amount of money paid was approximately Nine Hundred and some odd thousand dollars, paid to the Security Bank. Some additional bonds were thereafter received and Exhibit 7 is a correct schedule of bonds of Palo Verde Irrigation District, Palo Verde Drainage District, and Palo Verde Joint Levee District, for which the Federal Reserve Bank had paid moneys to the Security First National Bank. For all these bonds the Federal Reserve Bank paid the same number of cents per dollar of principal value.

Exhibit 7 was a schedule entitled as follows:

PETITIONER'S EXHIBIT NO. 7

"BONDS OF PALO VERDE IRRIGATION DISTRICT OR BONDS ASSUMED BY PALO VERDE IRRIGATION DISTRICT HELD BY LOS ANGELES BRANCH, FEDERAL RESERVE BANK OF SAN FRANCISCO, AS CUSTODIAN AND FISCAL AGENT FOR RECONSTRUCTION FINANCE CORPORATION AS OF JULY 15, 1937" [137]

The recapitulation contained in this schedule reads as follows:

(Testimony of L. C. Meyer.)

"RECAPITULATION OF BONDS & NOTE

Palo Verde Irrigation District First Issue Bonds	1,649,000.00
Palo Verde Irrigation District Second Issue Bonds	208,000.00
Palo Verde Mutual Water Company Bonds	169,900.00
Palo Verde Drainage District First Issue Bonds	835,500.00
Palo Verde Joint Levee District of Riverside & Imperial Counties First Issue Bonds	886,951.86
Palo Verde Joint Levee District of Riverside & Imperial Counties Second Issue Bonds	290,378.50
Note of Palo Verde Irrigation District	4,000.00
	$4,043,730.36"

A copy of a promissory note payable to D. A. Foley & Company for $4,000 signed by Palo Verde Irrigation District, Tony Sealey, president, and O. W. Malmgren, first assistant secretary, dated February 1, 1930, was introduced as petitioner's Exhibit 8, the note being the one that was detailed in the recapitulation of Exhibit 7.

The Federal Reserve Bank expended in these transactions $1,002,887.47. It received these funds from the Reconstruction Finance Corporation, drawing through the Treasurer of the United States. Payment was made at the rate of $24.81 per hundred dollars of principal, without taking any account of interest, and with certain deductions for missing coupons. The same rate was paid on Levee bonds, Irrigation bonds, Drainage bonds, and Mutual Water Company bonds. No note or agreement to pay executed by the District to the Reconstruction Finance Corporation was ever in the hands of the Federal Reserve Bank in connection with these transactions.

CULBERT W. FARIES

was called as a witness by petitioner and testified that he was assistant secretary and assistant trust officer of the Security First National Bank of Los Angeles and during the years 1934 and 1935 was in charge of an escrow held by the bank covering certain bonds of the Palo Verde Irrigation District and bonds assumed by [138] that district; that deposits of bonds were received from many individuals, partnerships, and corporations together with escrow instructions, the instructions being the same for the Drainage, Levee, and Irrigation District bonds. A different form of [139] instructions was used for the Mutual Water Company bonds.

One hundred sixty-nine thousand nine hundred dollars principal amount of Palo Verde Mutual Water Company bonds had been received.

A form of escrow instruction was introduced as

PETITIONER'S EXHIBIT NO. 9,

which reads as follows:

In Pencil:

(This agreement either in printed or typewritten form signed by all depositors except in certain cases the clause authorizing deducting for missing coupons was eliminated where no coupons were missing and also excepting the deposit by Ralph D. La Coe, Jr., covering a $100 Bond.)

(Testimony of Culbert W. Faries.)

ESCROW AGREEMENT AND INSTRUCTIONS

In Pencil:

(Deductions for missing coupons made at rate of 20.50 cents for each dollar par value.)

Security-First National Bank of Los Angeles
Corporate Trust Department
Sixth and Spring Streets
Los Angeles, California

I hand you herewith $169,900, principal amount of bonds of Palo Verde Mutual Water Company as follows:

Bonds numbered .... accompanied by coupons due .... and subsequent thereto, which you are authorized to deliver to or upon the order of the Board of Trustees of said Palo Verde Irrigation District upon receipt for my account of a sum of money equal to $500.00 for each $1,000 principal amount of said bonds, and a proportionately smaller amount for each bond of less than $1,000, provided, however, that where any bonds deposited by me do not have attached all unpaid coupons maturing subsequent to February 1, 1932, you are authorized to deduct on account of such missing coupons from the aforesaid sum of money to be paid me the amount determined upon by the Division Chief of the Drainage, Levee and Irrigation District of the Reconstruction Finance Corporation.

Unless all sums required, as above specified, have been received on or before the 30th day of June, 1934, then and in that event said bonds and coupons,

(Testimony of Culbert W. Faries.)

shall upon my written demand be returned to me; provided, however, that no such demand shall be effective in the event that a commitment has been entered into between the District and the Reconstruction Finance Corporation covering the deposit of funds to complete payment for said bonds and coupons as herein provided.

It is understood that the sums above provided to be paid to me shall be net payments and not subject to any expenses incurred in connection with this escrow or to any other fees or charges.

The acceptance of the above described bonds and coupons by the Bank, as escrow holder, shall not obligate the Bank to perform any service other than that of accepting for my account said sum or sums of money, when and if paid within the term herein fixed, or the safe return of said bonds and coupons to me, in the event said sum of money is not received for my account within the time herein specified.

Dated this day of 1934 [140]

....

....

Signature of Owner

....

Address

(Testimony of Culbert W. Faries.)

Another form of escrow instructions was introduced as

PETITIONER'S EXHIBIT NO. 10,

reading as follows:

ESCROW AGREEMENT AND INSTRUCTIONS

Security-First National Bank of Los Angeles
Corporate Trust Department,
Sixth and Spring Streets
Los Angeles, Calif.

I hand you herewith $.........................., principal amount of bonds as follows:

Palo Verde Irrigation District (first Issue) bonds numbered (Insert nos. of bonds here)..........................

Palo Verde Irrigation District (second Issue) bonds numbered (Insert nos. of bonds here)..........................

Palo Verde Joint Levee District (first issue) bonds numbered (Insert nos. of bonds here)..........................

Palo Verde Joint Levee District (Second issue) bonds numbered (Insert nos. of bonds here)..................

Palo Verde Drainage District bonds numbered (Insert nos. of bonds here)..........................

accompanied by coupons due..................and subsequent thereto, which you are authorized to deliver to or upon the order of the Board of Trustees of said Palo Verde Irrigation District upon receipt for my account of a sum of money equal to $232.48 for each $1,000 principal amount of said bonds, and a proportionately smaller amount for each bond of less than $1,000, provided, however, that where any

(Testimony of Culbert W. Faries.)

bonds deposited by me do not have attached all unpaid coupons maturing subsequent to October 30, 1929 you are authorized to deduct on account of such missing coupons from the aforesaid sum of money to be paid me the amount determined upon by the Division Chief of the Drainage, Levee and Irrigation Division of the Reconstruction Finance Corporation.

Unless all sums required, as above specified, have been received on or before the 30th day of June, 1934, then and in that event said bonds and coupons, shall upon my written demand be returned to me; provided, however, that no such demand shall be effective in the event that a commitment has been entered into between the District and the Reconstruction Finance Corporation, [141] covering the deposit of funds to complete payment for said bonds and coupons as herein provided.

It is understood that the sums above provided to be paid to me shall be net payments and not subject to any expense incurred in connection with this escrow or to any other fees or charges.

The acceptance of the above described bonds and coupons by the bank, as escrow holder, shall not obligate the bank to perform any service other than that of accepting for my account said sum or sums of money, when and if paid within the time herein fixed, or the safe return of said bonds and coupons to me, in the event said sum of money is not received for my account within the time herein specified.

(Testimony of Culbert W. Faries.)

Dated this day of , 1934

....

....

Signature of Owner

....

Address [142]

The witness testified that this form was used by the depositors of the Palo Verde Irrigation District, Palo Verde Joint Levee District, and Palo Verde Drainage District bonds. That by October 31, 1934, $1,645,000 principal amount of Palo Verde Irrigation District first issue bonds, $208,000 principal amount of Palo Verde Irrigation District second issue bonds, $886,951.86 principal amount of Palo Verde Joint Levee District first issue bonds, $285,-378.50 principal amount of Palo Verde Joint Levee District second issue bonds, and $834,000 principal amount of Palo Verde Drainage District bonds had been received, making a total of $3,859,330.36.

The witness testified that he signed the two letters, Exhibit 6, and delivered them to the Federal Reserve Bank. On October 31, 1934, the witness completed delivery of the bonds to the Federal Reserve Bank mentioned in Exhibit 6. Thereafter bondholders made further deposits of bonds of the Palo Verde Irrigation District, Palo Verde Joint Levee District, and Palo Verde Drainage District which were handled in the same way as the first deposit of bonds. The Security Bank received nine hundred

(Testimony of Culbert W. Faries.)

and eighty-one thousand eight hundred and nineteen dollars and fifteen cents from the Federal Reserve Bank for the first lot of bonds and the bulk of this money was paid to the depositors of the bonds in accordance with their instructions and a small difference to pay the expenses of the Security Bank and possibly an expense or two of the Irrigation District. The Palo Verde Irrigation District paid money to the bank because there wasn't sufficient left over after payments to the bondholders to meet the expenses. The witness did not remember the exact amount the district paid in a particular case but testified that he did check up on the total amounts received from the district and paid over to the district and further testified that the Security Bank received from the district some 1,450 odd dollars and paid to the district some 560 dollars in connection with the escrow so that there was a balance which the district had furnished of about 950 dollars. [143]

About 85 per cent or a little over of all the bonds were deposited by one group of men, (the witness not recalling whether the name of the group was the Palo Verde Properties Inc. or the Bondholders' Protective Committee). The disbursement on bonds deposited by this group was made to the order of this group but direct to the individual bondholders. The original and most of the several deliveries of bonds to the Federal Reserve Bank were made for the account of the Security First National Bank and subject to the latter's further instructions.

After the physical delivery of the total of the

(Testimony of Culbert W. Faries.)
bonds a formal delivery was made to the Federal Reserve Bank with the following instruction:

> "You are hereby authorized and instructed to use all of the bonds and coupons represented by the above described receipt in accordance with the instructions of the Board of Trustees of the Palo Verde Irrigation District when you are ready and able and willing to pay us the sum of $981,819.15."

The bank was instructed by the Board of Trustees of the Palo Verde Irrigation District to deliver the bonds to the Federal Reserve Bank, Los Angeles branch.

The witness identified a resolution which was thereupon introduced in evidence by respondents as their Exhibit A. This Exhibit reads substantially as follows:

RESPONDENTS' EXHIBIT A

Resolution Authorizing Instructions to Security-First National Bank of Los Angeles in the Matter of Closing R. F. C. Loan Escrow.

Whereas, For the purpose of consummating the loan for which Palo Verde Irrigation District heretofore applied to the Reconstruction Finance Corporation, an escrow was opened by this District with Security-First National Bank of Los Angeles, Corporate Trust Department, Trust No. 6070, pursuant to resolution of the Board of Trustees of said District, adopted on April 12th, 1934, and said escrow is now pending and certain bonds issued or assumed

(Testimony of Culbert W. Faries.)

by this District have [144] been deposited in said escrow; and

Whereas, It is expected that said escrow will shortly be consummated and closed;

Now, Therefore, It Is Hereby Resolved by said Board of Trustees that Security-First National Bank of Los Angeles, as holder of said escrow, is hereby instructed to close said escrow as follows:

1. Deliver promissory note, executed by this District, dated February 1, 1930, payable to the Order of D. A. Foley & Co., assigned to Bank of America, for the principal sum of $4000.00, payable January 2, 1932, and all bonds and coupons thereof of Palo Verde Mutual Water Company, Palo Verde Joint Levee District of Riverside and Imperial Counties, California, Palo Verde Drainage District and Palo Verde Irrigation District, held by said escrow-holder at the time of closing said escrow, pursuant to the depositors' instructions, to Federal Reserve Bank of San Francisco, Los Angeles Branch, for the account of Reconstruction Finance Corporation, upon collection from said Federal Reserve Bank, for the account of this District, of a sum equal to $1000.00 plus 24.81 cents per dollar of the aggregate principal amount of said bonds, less deductions from said aggregate amount for unpaid coupons of said bonds which you do not hold in said escrow, according to schedule thereof attached to this resolution such deductions to be made at the rate of 20.50 cents per dollar of the face value of said undeposited

(Testimony of Culbert W. Faries.)

coupons maturing prior to May 31, 1933, and face value for those maturing thereafter.

2. From the proceeds received from the Federal Reserve Bank pay to Bank of America One Thousand Dollars ($1000.00) for said $4000.00 note; also pay to Palo Verde Valley Properties, Inc. a sum equal to Five Dollars ($5.00) for each Thousand Dollars ($1000.00) of principal amount of bonds of said three districts delivered by you to said Federal Reserve Bank under these instructions, pursuant to resolutions of this Board heretofore adopted.

Also pay to yourselves the sum of Five Hundred Dollars [145] ($500.00) covering your escrow fees in said escrow, and the further sum of Forty Dollars ($40.00), in full of expenses incurred by you in said escrow, including transportation of bonds and printing expense.

Also pay to each depositor of any of said bonds of Palo Verde Mutual Water Company sums computed at the rate of fifty cents (50¢) per dollar of principal value of bonds of said Company deposited by him, and to each depositor of bonds of any of said three districts sums computed at the rate of 23.248 cents per dollar of principal amount of bonds of any of said three districts deposited by him.

3. The officers of this District are hereby directed to deposit in said escrow a check on water toll account for the sum of Five Hundred Forty Dollars ($540.00), covering said escrow fees and ex-

(Testimony of Culbert W. Faries.)

penses, and a warrant on the County Treasurer for the sum of Six Hundred Eighteen and 08/100 Dollars ($618.08), said warrant to be used by said escrow-holder so far as necessary to close said escrow under these instructions. Said warrant shall be delivered, in lieu of cash to its face amount, to Palo Verde Valley Properties, Inc., on account of the sums payable to it under these instructions.

4. The Assistant Secretary of the District is hereby directed to file with said escrow-holder a certified copy of this resolution. (Schedules of bonds and certification of O. W. Malmgren).

The original, of which the Exhibit A was a copy, was received by the witness from the Palo Verde Irrigation District.

The disbursement to bondholders on Palo Verde Mutual Water Company bonds was at the rate of 50 cents on the dollar while the disbursement on the bonds of the Palo Verde Drainage District, Palo Verde Joint Levee District, and Palo Verde Irrigation District, was at the rate of 23.248 cents per dollar, but the amounts received by the Federal Reserve Bank was on the basis [146] of 24.81 cents per dollar for the gross amount of all bonds irrespective of whether the bonds delivered were those of the Palo Verde Mutual Water Company, Palo Verde Irrigation District, Palo Verde Joint Levee District, or the Palo Verde Drainage District.

(Testimony of Culbert W. Faries.)

He was also in charge of a trust under which his bank was trustee under the deed of trust establishing the Palo Verde Mutual Water Company bond issue and that the deed of trust roughly covered all the operative irrigation system of the Mutual Water Company and subsequent additions thereto.

R. V. JENSEN

was called as a witness for the petitioner and testified that he was an employee of Anderson-Clayton & Company and affiliated companies and was in charge of production credits for his company over the entire cotton areas in California, Arizona, and Baja California, which cover about 900,000 acres. His company is engaged in the financing of cotton production in irrigated sections, in cotton handling facilities, and in cotton merchandising throughout the entire cotton belt in the South, besides California and Arizona. Ever since and including the season of 1930, excepting 1932, he had been connected with cotton financing in the Palo Verde Valley on behalf of his employer and in the year 1937 he had handled the financing of 40 per cent of the cotton acreage of the Palo Verde Valley. In 1937, cotton production of the Palo Verde Valley had been reduced by 25 per cent because of pests and diseases. On account of these threats the company expects to reduce the acreage in the Valley it will finance in the future.

(Testimony of R. V. Jensen.)

The amount of his company's loans in Palo Verde Irrigation District in the present year amounted to about $100,000, with a carry-over of old loans amounting to an additional amount of about Five Thousand Dollars, the loans being secured by crop and chattel mortgages. In 1935 the company voluntarily scaled down its overdue loans in the Valley to an average of 10% of the amounts on its books. [147]

In 1936 there were 13,460 acres in cotton in the Palo Verde Valley which produced 7,514 bales of cotton, the cotton and seed together being worth $76 a bale. In the present season of 1937 there were 14,850 acres in production which had already produced 4,000 bales. The funds advanced to the farmers by his company are used for the purpose of paying water assessments, taxes, stand-by charges, labor, gas, and oil and other expenses incident to producing and harvesting cotton crops, and in some cases for living expenses. His company attempts to pay the farmers' obligations to the district direct. When the crop is produced it is hauled to the gin and his company takes possession of it, as a rule. At the end of the season an account is made with the grower. Only a very small loss was made during 1936 by his company. The back debts which the company scaled down in 1935 were amounts by which the crops produced failed to pay taxes and the expense of growing the crops.

CHARLES H. LEAVINGSWORTH

was called as a witness by the petitioner and testified that he had been a cotton classifier for 26 years. He classified three samples of cotton which were introduced as petitioner's Exhibit 11 for identification as good middling, middling and strict low middling, worth approximately 1 cent per pound over, equal to, and one cent per pound under the New York market price of cotton, respectively.

EDWIN F. WILLIAMS

was called as a witness for the petitioner. It was stipulated by counsel that the testimony of this witness given at a former court hearing should be introduced in evidence by the transcript thereof subject to the objection made by respondents that the testimony was too remote, which objection was taken under advisement and ruling reserved, as petitioner's Exhibit 14. The testimony comprising Exhibit 14 was taken in the District Court of the [148] United States for the Southern District of California, Central Division, "In the Matter of the Application of Palo Verde Irrigation District, an Irrigation District, For a Decree Authorizing Readjustment of Debts" in bankruptcy under Section 80 of the Bankruptcy Act of 1898 heard October 2nd and 3rd, 1935 in which the witness testified that he was 69 years of age and that he had first entered the Palo Verde Valley in 1904. The valley is in the

(Testimony of Edwin F. Williams.)

eastern end of Riverside County with the Colorado River forming the eastern boundary. The valley is some 30 miles north and south and a few miles to some seven miles in width. In 1904 the valley was covered with a jungle growth and there was very little agriculture. There were a few people in the lower end of the valley and they pumped water out of the sloughs and farmed a small acreage. The remains of an irrigation system started by Thomas Blythe in the early 80's were there. The Mutual Water Company was organized in 1908 and this company and the Land and Water Company raised some levees. Expenses were paid at first by direct assessments, but in 1916 a bond issue of five hundred thousand dollars was made by the Mutual Water Company. In 1904 the valley comprised about 60,000 acres of government lands and 42,000 acres known as the Blythe Estate. In 1908 the Blythe estate was purchased by the Palo Verde Land and Water Company and the company began to sell parcels of it. In 1910 a lot of the valley was opened up for settlement by the government. The Mutual Water Company continued to manage the irrigation system but about 1915 the Palo Verde Joint Levee District was formed to levee the valley for protection against floods which were caused by the fact that the river bed was rising year by year.

The rising river bed also caused a rise of the water-table of the valley and required drainage, and a drainage district was formed to provide drainage.

(Testimony of Edwin F. Williams.)

A bond issue of $850,000 was sold for drainage purposes. The Palo Verde Irrigation District was [149] organized in 1923. The witness had been assessor for the district since 1928 and had been a deputy county assessor since 1927 assessing the Palo Verde Valley for county purposes. In 1922 about 60,000 acres of the valley were flooded and the loss was perhaps about $1,000,000 and many of the people left the valley.

In 1928 the witness assessed some 24,000 acres at from $87.50 to $100 an acre. He assessed another 6,000 acres at from $52.50 to $87.50; some 15,000 acres at $37.50 per acre; and another portion of 15,000 acres at $25 an acre. At that time he thought it would be possible to eventually put under cultivation some 39,500 acres. In 1929 the total assessed value of the district upon the district assessment roll was about $4,000,000. The assessment was based upon a scale of $100 an acre, the maximum, [150] and going down to below $10 an acre. District assessments were 2½ times the county assessment. There were no delinquencies in Mutual Water Company assessments when the Palo Verde Irrigation District was formed.

The district has water rights which were first acquired by filings made in 1878 and 1879 by Mr. Blythe. These are the earliest rights in point of time on the lower Colorado River in California. The right extends to all the water that the valley can beneficially use for its entire acreage.

(Testimony of Edwin F. Williams.)

The stock of the Mutual Water Company was owned by landowners owning about 42,000 acres of land. Each acre owned was required to have a share of stock in the Mutual Water Company and when bonds were issued in 1923 to take up the stock of the Mutual Water Company each shareholder received some $27.50 and the total amount was approximately $1,250,000.

The construction of the Boulder Dam and control of the water in the river should prevent any great floods in the future except flash floods from cloudbursts or something of that kind. The Boulder Dam will also reduce the silt content of the river and therefore decrease the cost of operation of the district, but the elimination of silt will cause the river to scour down raising the problem of getting water into the intake of the district.

Eventually there will be 40,000 acres perhaps in cultivation in the valley. About 25,000 acres are under cultivation now. The total assessed value of farm lands includes improvements but the improvements are assessed very lightly.

It was stipulated that 99.6 per cent of the land in the district had been deeded and conveyed to the district for delinquent district taxes.

After the district is refinanced, the district proposes to sell the land back to the former owners at five cents on the dollar of the assessed valuation of the land. Assessments are [151] made for grammar school bonds and bond interest within the Palo

(Testimony of Edwin F. Williams.)
Verde Irrigation District. It was stipulated that the County of Riverside had certain obligations in the way of bonds which are paid out of taxes in the area of the Palo Verde Irrigation District together with possibly other areas in the county and that the city of Blythe which is situated within the district has issued bonds which are outstanding and unpaid.

Average annual rainfall in the valley is between 2 and 3 inches; sometimes there is practically no rainfall for one or two years.

Summer temperatures very seldom go above 122 degrees.

It was also stipulated that a deposition of R. L. Adams, agricultural economist at the University of California, College of Agriculture, also taken in the former judicial proceeding in the Bankruptcy Court upon notice, on September 26, 1935, be introduced in the proceeding as Exhibit 15. (Both Exhibits 14 and 15 were received in evidence subject to respondents' objections on the ground of remoteness, as well as all other relevant objections.)

R. L. ADAMS,

on deposition

was sworn as a witness and testified that he was a professor of farm management for the College of Agriculture, University of California, and also agricultural economist in the experiment station and

(Deposition of R. L. Adams.)
agricultural economist with the Giannini Foundation, all of the same institution and that he had been working in the field of farm management and agricultural economics in the employ of the University of California since March 1, 1914. He has also worked for the United States Department of Agriculture and the State Department of Agriculture of California. As a part of his work he had made studies of the financial affairs of the Imperial Valley, the Anderson-Cottonwood Irrigation District, Modesto Irrigation District, Turlock Irrigation District, and Fresno Irrigation District. [152]

He first visited the Palo Verde Valley in 1908 or 1909, and subsequently, in May 1931, made an economic study thereof and a couple of years later made a brief survey of conditions, and the last study was made in a portion of the week of September 9th of 1935. Five or six days were spent in the valley at the time of the study of 1931. The principal study at that time was as to the ability of the farmers to pay out on their indebtedness. The sources of information in making the survey were a soil survey of the valley as the basis of acreages of different soil types and alkali contents, the experience of the Federal Land Bank, and the principal source was numerous interviews with individuals in the valley, especially farmers.

A cropping program is likely to be pursued on approximately 30,000 acres in the valley.

For the period 1931 to 1935, the principal crops in the valley were alfalfa, wheat, grain, sorghum, cot-

(Deposition of R. L. Adams.)

ton, a little barley, sudan grass for seed, and there is also a small planting of flax and a small acreage of pecans. Cotton and alfalfa will probably continue to be major crops in the valley and about one-third of the crop area was used for each of those two crops. The quality of the soil and its productiveness have not changed materially in the last four years, but when land is continually cropped to cotton or some other crop some rotation will be necessary.

Taking an average of prices for the years 1910 to 1914, the so-called normal years in agriculture, and the years 1930 to 1934, the so-called depression years, the fair price base to adopt for forecasting the future is: alfalfa hay, $8.60 a ton; alfalfa seed, field run, 16 cents a pound; wheat, $1.26 per hundred; grain sorghum, $1.06 per hundred weight; cotton, 12.8 per pound of lint; cotton-seed, $22.50 a ton. Forecasting over a period of twenty to thirty years in the future on the basis of 30,000 acres in crops and the foregoing prices, the gross income of the valley would be $1,189,795 annually. [153]

It was his conclusion that the cost of producing crops, payable out of gross income, will be $822,-750.00. The figures take into consideration all the man labor, seed, irrigation water, county taxes, contract work of threshing, baling, chopping cotton, and other items. In regard to the item of irrigation water, that item includes operation and maintenance figured at $4 an acre. Bond interest or principal is

(Deposition of R. L. Adams.)

not included in the item of irrigation water. Further, an additional $150,000 will be paid out of the gross income for the living of the farmer and his family. One hundred twelve thousand five hundred dollars should be assigned to replacement of equipment. Additional amounts may be assigned to be paid out of gross income, such an additional indebtedness, if 5,000 acres is added to the present crop acreage, district costs and expenses, and an amortization Reconstruction Finance Corporation loan of approximately $1,000,000 at 4 per cent interest. The total item of payments out of gross income would therefore equal $1,275,917.00. This figure does not take into account the item of control of the Colorado River or the protection of the valley by leevees, or river work. His opinion is that a loan of approximately $1,000,000 is about all that can be reasonably expected for the Palo Verde Irrigation District to sustain. On the figures given the gross income per acre should amount to approximately $39.33. The cost of producing crops including water toll and county taxes should amount to $27.42, leaving a difference of $11.91.

There are approximately 50,000 irrigable acres in the valley according to information collected in May 1931. He did not know if there were 35,000 acres irrigated in 1929. There are approximately 88 odd thousand acres in the district of which 10,000 lie outside of the levees. The difference indicates simply 78,000 irrigable acres but measured by the

(Deposition of R. L. Adams.)

amount of available water the 78,000 acres should be cut down. He did not know anything about the water rights in the district or the amount of water that has been available for irrigation nor the average water duties during the last several years in the valley. There [154] is some evidence that on individual farms and fields there has been excessive use of water, He did not know for how much acreage there would be available water. There are five main types of soils in the valley namely Holtville, Imperial, Rositas, Gila, and Meloland, with several sub-types under each of these types. The crop producing soils are principally Imperial, Holtville, Meloland, and some Rositas. The valley shows approximately 33,356 acres of Hopeville, 18,432 acres of Imperial, 17,792 acres of Rositas, 6,784 acres of Gila, 5,440 of Meloland. The livestock program should have a definite place in the valley. Lamb, sheep, and hog fattening are possibilities.

The district can stand a charge of $60,000 a year for amortization of its bonded debt except for unforcastible contingencies.

The City of Blythe was not taken into account in the calculation made by the witness.

The valley has a year round growing season based on a choice of crops, there being approximately three months when frost occurs. There is evidence of a movement upon the part of the old S. E. R. A. to purchase land and develop a colony in the valley. Recent increases in business were not taken into con-

(Deposition of R. L. Adams.)

sideration in calculating the forecast of prices. The valley's future depends not only on the better class of farmers that are in there but a gradual increase in that better proportion, both on new lands and on the lands that have already been farmed.

It was stipulated that at the time of the filing of the petition and at the present time there were and are bonds of the County of Riverside, City of Blythe, and of high school and grammar school districts, overlapping the area of the Palo Verde Irrigation District which bonds are payable out of taxes and assessments currently levied upon the lands of those taxing agencies which are [155] within the Palo Verde Irrigation District. The bonds of the City of Blythe are in default. A group of individuals interested in the City of Blythe have subscribed a fund from which the general obligation bonds of the City have been purchased from the former owners at from 29.50 to 75 on the 100 with an average of a shade less than 50 cents on the dollar of principal value, disregarding delinquent interest, and all of these bonds, except one $1,000 bond, are on deposit in a bank at Blythe awaiting the process of readjustment on that basis. None of the obligations of those taxing agencies are involved in this proceed-

ing or in any other proceeding in which they are being forcibly adjusted.

It was further stipulated that taxes of the City of Blythe have at all times since its organization been collected by the County of Riverside through the regular County assessment channel.

E. F. WILLIAMS

was called as a witness by the petitioner and testified that he had resided in the Palo Verde Valley since 1908 and that he has been assessor of the Palo Verde Irrigation District since 1927. Referring to the year 1930 and to the fact that on May 1, 1930, the Palo Verde Irrigation District defaulted upon the payment of principal and interest on bonds due on that date. The Irrigation District trustees appointed a committee to try to get some federal aid for the district. The committee met with Dr. Mead, Commissioner of Reclamation of the Interior Department, and other officials, at Yuma, Arizona, and upon their suggestions the district was included in a survey of some 17 districts made by the Federal government.

Pages 39, 234, 235, and 236 of a document entitled "Economic Survey of Certain Federal and Private Irrigation Projects, Hearings before the Committee on Irrigation and Reclamation, House of Representatives, Seventy-first Congress, Second Session" was introduced as petitioner's Exhibit 16 for the

(Testimony of E. F. Williams.)
limited purpose of [156] showing good faith on the part of petitioner in that steps were taken by the landowners of the district to inform themselves as to their economic condition and as to means by which they might emerge from their predicament.

The bill for the relief of the 17 projects never passed Congress. The committee also met with Congressman Swing and he advised attempting a separate bill for relief. Preparatory to proceedings of Congress on such a bill a fact-finding committee of six or seven persons of the Palo Verde Valley investigated the financial condition of the Valley and the earning capacity of the lands in the District. It sent out a questionnaire to the farmers throughout the valley trying to see what they could do in future years by building up the soil and having a crop rotation plan that would keep up the fertility. Approximately 35 to 40 persons were investigated by such a questionnaire. They furnished detailed data as to what their crops were and what they received for them. The University of California sent Professor Adams from Berkeley to make a report on the valley. He made an investigation and report. Also a bondholders protective committee had been organized at the suggestion of the district and it sent an engineer to make a survey of the valley. A committee of 4 went to Sacramento and met with Mr. Meeks, Director of Public Works, and State Engineer Hyatt, and they made a report to the Secretary of the Interior regarding the valley. The report con-

(Testimony of E. F. Williams.)
sisted principally of a memorandum made by Ray F. Carberry to Mr. Hyatt, State Engineer. Mr. Carberry's report was introduced in evidence as petitioner's Exhibit 17.

The witness and other persons appeared before the House Committee on Irrigation and Reclamation when a hearing was held upon the bill introduced by Congressman Swing. The bill did not pass Congress. The bill, provided for the making by the government of a grant of one million dollars at the rate of $200,000 annually for five years beginning with the year 1932 as reimbursement of [157] *of* past expenditures by the district for flood protection. This money was to be paid to the bondholders. It also provided for the appropriation of additional sums, provided no part of the money should be appropriated until an agreement satisfactory with the Secretary of the Interior was entered into between the holders of at least 85 per cent of the outstanding bonded indebtedness of the district, and the district, whereby said holders consented to the reduction of the indebtedness to a sum which the Secretary of the Interior finds is not in excess of the district's ability to pay. Subject to respondents' objection that the evidence was too remote and immaterial it was stipulated that the house committee made a report recommending passage of the bill and that the Secretary of the Interior and Commissioner of Reclamation recommended the same thing to the House Committee.

(Testimony of E. F. Williams.)

The witness further testified that drainage ditches in the valley consist of many miles of open deep dug ditches constructed about 1921. The ditches haven't been cleaned in ten years and are obstructed and have ceased to function. The ground water table is rising but it has not affected conditions greatly as yet. The land has deteriorated by reason of high water table.

The aggregate assessed value of the land in the district is $3,000,000 and some odd thousand dollars as of 1937, including improvements. The assessment of the City of Blythe raises the aggregate about $100,000.

It was stipulated that the Bondholders' Committee was in existence from approximately May or June 1930 to the early part or middle of 1934 and during the four years, it succeeded in accumulating approximately 87 per cent in principal value of all the bonds of the three districts but not including any of the Mutual Water Company bonds, which it did not handle. The investigating committees mentioned by Mr. Williams were usually appointed by the district trustees. [158]

Lands which the district has sold lately are those lands which have been tax deeded to the district. They sold at public auction after an initial application has been obtained from somebody who wants to buy. In the last year 4,500 acres have been sold for $35,000, an average of $8.35 per acre.

LEWIS A. HAUSER

was called as a witness for petitioner and testified that he is connected with Hauser Stock Farms, a corporation composed of members of his family, and the corporation in 1913 acquired a ranch in the Palo Verde Valley of about 2,000 acres which at the present time is partly improved and partly unimproved. He became a member of the board of directors of Palo Verde Irrigation District in 1928 and was made president of the board in 1929 and served as such until the last October. At the present time he is vice-president of the Palo Verde Irrigation District.

The fact-finding committee, of which Mr. Williams was chief, was appointed by the district board. Bondholders were contacted in about 1930 and the district requested the organization of a bondholders' committee, and the committee was appointed consisting of representatives of several banks and other owners of bonds and had its headquarters in Los Angeles. The district had several meetings with the group representing bondholders. The primary object at that time was to get the district bonds under a certain committee where the district could negotiate with them for settlement. Following the failure in 1931 to secure a million dollar grant from Congress, the District continued to negotiate with the Bondholders' Committee toward compensating them for their bonds. There was originated from the Bondholders' Committee a lease known as the Florence Clark Lease.

(Testimony of Lewis A. Hauser.)

It was stipulated that there was finally arrived at on August 18, 1932, a document which was executed by the bondholders through Florence Clark, an individual, and executed by the district [159] which provided that for five years the district should lease to the bondholders all lands then tax-deeded and all lands which were to be tax deeded in the five years and that the bondholders were required to sublease their land back to the former owners of the land upon certain terms. The lease contained an option in favor of the bondholders' corporation to transfer to the district for cancellation all of the bonds ($4,174,000) for cancellation, upon the district granting to the bondholders all of the tax-deeded land subject to certain conditions, the chief one being that the bondholders would be required to enter into agreements of resale of any individual tract to the former owner should the latter desire to repurchase it upon specific terms or prices based upon the assessed valuation for 1929 and upon 20-year payments with interest at 5 per cent; and that within the five years the bondholders should get in and surrender all of the bonds. The effect of the instrument would have been to repay to the bondholders a total sum amounting to about 40 per cent of the principal face value of their bonds disregarding interest, such amount being repaid over a period of 20 years as the lands might be resold. (End of stipulation.)

(Testimony of Lewis A. Hauser.)

The Bondholders' Committee then went into possession of the tax-deeded land and executed numerous subleases to former owners. The lease arrangement was in effect from August 18, 1932, until October 31, 1934.

It was stipulated that the district filed an application in July, 1933, with the Reconstruction Finance Corporation for a loan under the terms of Section 36 of the Farm Mortgage Act of 1933. The application requested a loan of $1,140,000 and was followed by an economic appraisement of the district by an appraiser appointed by the Reconstruction Finance Corporation. (End of stipulation.)

The witness went to Washington in the months of December and January of 1933 and 1934 and had a discussion with the Chief [160] of the Division of Drainage of the Reconstruction Finance Corporation, Emil Schram, and found that the application as filed by the district was rejected. But he furnished additional information to Mr. Schram and on March 1, 1934, the application was approved. A copy of the resolution approving the application was introduced in evidence as

(Testimony of Lewis A. Hauser.)

PETITIONER'S EXHIBIT No. 18

reading as follows:

MEETING OF RECONSTRUCTION FINANCE CORPORATION. RESOLUTION. RE. PALO VERDE IRRIGATION DISTRICT. [161]

Docket No. Ref. 92

Whereas Palo Verde Irrigation District, of Blythe, California, a political subdivision duly organized under the laws of the State of California (herein called the "District"), has applied to this Corporation for a loan to enable it to reduce and refinance its outstanding indebtedness, pursuant to the provisions of Section 36, Part 4, of the Emergency Farm Mortgage Act of 1933, as amended; and

Whereas the District has represented that prior to May 12, 1933, it had completed a project devoted chiefly to the improvement of lands for agricultural purposes and that in connection with such project it had incurred and now has outstanding indebtedness in approximately the following amounts:

Nature of Debt	Principal Amount	Interest Unpaid on May 31, 1933	Total Outstanding
Bonds	$4,174,330.00	$731,432.00	$4,905,762.00
Note of Bank of America at Los Angeles	4,000.00		4,000.00
	$4,178,330.00	$731,432.00	$4,909,762.00

(Testimony of Lewis A. Hauser.)
Such indebtedness, together with all interest accrued and unpaid thereon as of May 31, 1933, is hereinafter referred to as the "Existing Debt" and the bonds and coupons or other instruments evidencing such Debt are hereinafter referred to as the "Old Securities." In addition to the above described indebtedness the District has outstanding a note for $90,000.00 held by the Palo Verde Mutual Water Company and secured notes aggregating $7,010.00 held by the Ruth Dredger Manufacturing Corporation. It is represented that the indebtedness due to the Palo Verde Mutual Water Company is not to be refinanced with the proceeds of the loan authorized by this resolution, but upon completion of this proposed refinancing is to be cancelled by the Palo Verde Mutual Water Company. The notes held by the Ruth Dredger Manufacturing Corporation seem to be sufficiently secured and are not to be [162] refinanced with the proceeds of the loan hereby authorized. Accordingly, the term "Existing Debt" as used in this resolution does not include the indebtedness due to the Palo Verde Mutual Water Company and to the Ruth Dredger Manufacturing Corporation; and

Whereas this Corporation has caused an appraisal to be made of the property securing or underlying the Old Securities and has determined that the project of the District is economically sound, and now desires to make a loan to enable said District to reduce and refinance all or by far the greater

(Testimony of Lewis A. Hauser.)

part of such Existing Debt on the basis of payments to holders of its Old Securities, or to Committees or other representatives of such holders, at the rates herein set forth,

Now, Therefore, Be It Resolved, that there is hereby authorized a loan of not exceeding $1,039,-423.00, to or for the benefit of said District, subject, however, to the following terms and conditions:

1. Time Limits. All loans hereunder shall be disbursed on or before June 30, 1934, but the Chief or Acting Chief of the Drainage, Levee and Irrigation Division (hereinafter referred to as the "Division Chief"), may fix any shorter time within which such loans must be disbursed.

2. Deposit of Old Securities. The holders of Old Securities who join in this plan of refinancing shall deposit the same with one or more committees, depositaries, or other responsible representatives satisfactory to them, which shall consent to the plan of refinancing contemplated by this resolution (hereinafter referred to as "Owners' Agents"), or shall otherwise give this Corporation satisfactory assurances that the Old Securities held by them will be subjected to such plan, in which latter case they are hereinafter referred to as "consenting owners." Old Securities deposited with Owners' Agents or held by Consenting Owners are hereinafter referred to as "Deposited Securities". Each Owners' Agent shall be duly authorized to receive all

(Testimony of Lewis A. Hauser.)

moneys payable to the holders of Old Securities deposited with it, to surrender the Deposited Securities and do all other acts and things necessary to enable the District to effect a reduction in its indebtedness to the extent and in the manner contemplated by this resolution.

No loan shall be made hereunder (a) unless all of the Old Securities shall be thus deposited or (b) unless the Division Chief shall deem that such a large proportion of such securities has been deposited as will [163] satisfactorily accomplish the purposes of this Corporation in authorizing this loan. In this latter event, as hereinafter more fully provided, lesser amounts may be payable on the Deposited Securities than in case all of the Old Securities are deposited.

3. Payments on Deposited Securities. The amounts to be loaned by this Corporation hereunder shall be sufficient to provide for payments of different amounts of money on account of the Deposited Securities, as follows:

(a) 24.81 cents for each dollar of principal amount of bonds, provided that all of the bonds shall have been deposited at the time when this Corporation makes its first loan hereunder.

(b) 24.81 cents for each dollar of principal amount of such bonds, in case the District is unable to procure the deposit of all of such

(Testimony of Lewis A. Hauser.)

bonds, but shall procure the deposit of such large proportion thereof as shall be required or approved by the Division Chief.

(c) 22.81 cents for each dollar of principal amount of bonds that are not thus deposited at the time when the first loan is made pursuant to the provisions of subparagraph (b) of this section, but which are subsequently deposited within such time or times, as may be fixed or approved by the Division Chief.

(d) 25 cents for each dollar of principal amount of the $4,000 note held by the Bank of America of Los Angeles, provided that said note is surrendered at the time when this Corporation makes its first loan hereunder.

Each Deposited Security shall be accompanied by such of its appurtenant coupons, if any, representing interest accrued on or before May 31, 1933, as may be required by the Division Chief and shall also be accompanied by all coupons representing interest payable thereon after such date. In case any such security shall not be accompanied by any coupon required by the Division Chief representing interest accrued on or before the aforesaid date, the amount payable thereon shall be reduced in such amount as may be determined by the Division Chief, but such reduction shall not be less than 20.50 cents for each dollar of the face amount of such missing

(Testimony of Lewis A. Hauser.)

coupons. In case any Old Securities shall be presented with any coupons missing that mature after the aforesaid date, the Division Chief may refuse to accept the same, or if such security is accepted there shall be deducted from the amount to be paid on account thereof a sum equal to the full face amount of such missing coupons.

In case any Old Security shall be deposited without being accompanied by all the required coupons and if because of such missing coupons reductions are made in the amounts payable on account of such Old Security, but thereafter such missing coupons are deposited within such time or times as may be prescribed or approved by the Division Chief, there shall be paid on account of such coupons subsequently deposited amounts exactly equal to the sums which were originally deducted from the sum paid on account of such Old Security to which such coupons appertained.

4. Disposition of Balance. Any balance of the loan hereby authorized that is not required for making such payments as aforesaid on account of Deposited Securities may be applied in the sole [164] discretion of and as may be approved by the Division Chief to either of the following purposes:

(a) To the payment to such persons as the Division Chief may designate of costs in-

(Testimony of Lewis A. Hauser.)

curred in connection with this refinancing, for fees of municipal bond counsel, printing and issuance of New Bonds, or appraisal of the lands within the District, but only in such amounts as may be approved by the Division Chief.

(b) To payment of any sums that it may prove advisable to advance in order to avoid the necessity for issuance of any New Bonds having a principal amount of less than $1,000.

In addition to the maximum amount of the loan authorized above, the Treasurer of this Corporation is also authorized to advance such sums as may be approved by the Division Chief for payment of any interest accrued for the then current interest period on any bonds or securities acquired by this Corporation and any other sums required for interest adjustments.

5. How Loans are to be Effected. Unless the Division Chief shall direct otherwise, loans made hereunder shall be conditioned upon the authorization by the District of new 4% bonds (herein referred to as "New Bonds") having a principal amount sufficient in the opinion of said Division Chief and Counsel for this Corporation to insure completion of the proposed refinancing. Such loans shall be effected in any of the following ways as said Division Chief and Counsel shall direct:

(Testimony of Lewis A. Hauser.)

(a) If the Division Chief shall deem it advisable to have the deposited securities cancelled immediately upon issuance of the New Bonds, such loans may be advanced directly to the District or to the Owners' Agents and consenting owners at the time of the surrender and cancellation of the Deposited Securities but only upon receipt by this Corporation of New Bonds having a principal amount equal to the amount of the loans it has made hereunder.

(b) In the event that the Division Chief shall deem it necessary to keep any or all of the Deposited Securities alive for a greater or lesser length of time in order to maintain a parity of rights as between the holders of the Deposited Securities and the rights of the holders of Old Securities who did not deposit same, or for any other purpose, then such loans may be made directly to the Owners' Agents and consenting owners. All such loans shall be represented by the notes of such consenting owners or Owners' Agents and the Deposited Securities shall be pledged as security therefor. When executed by Owners' Agents, such notes may provide that the makers thereof shall not be individually liable thereon. Each such note shall give this Corporation authority at any time to surrender all or any part of the pledged securi-

(Testimony of Lewis A. Hauser.)

ties to the District in exchange for New Bonds and shall also authorize this Corporation, upon first having requested payment of such note and payment having been refused, to purchase the pledged securities at such sale as may be provided for by such note.

Each such note shall bear interest at the rate of 4% per [165] annum, payable as nearly as practicable on the interest payment dates borne by the major part of the Deposited Securities. The District shall not be a party to such note but in case it shall pay the interest thereon promptly when and as the same falls due, the Corporation will accept such interest payments and will thereupon give credit to the District for payment of the interest for such period on all the Deposited Securities at that time held by this Corporation, it being expressly provided, however, that nothing contained in this resolution shall be deemed to limit the right of this Corporation to enforce full payment of interest or principal on Deposited Securities it may hold, at any time when it may deem it advisable to do so in order to protect its rights as holder of the Deposited Securities against any rights claimed by the holders of Old Securities that have not been deposited.

As a condition precedent to the making of any such loan in the manner provided in this

(Testimony of Lewis A. Hauser.)

subparagraph, the Division Chief and Counsel for this Corporation may require the District to execute or agree to execute such amount of its New 4% Bonds as they may specify and when executed, to deliver such Bonds to a trustee or custodian satisfactory to this Corporation. Such trustee or other custodian shall be irrevocably bound to exchange such New Bonds for the Deposited Securities held by this Corporation at any time when it shall so request, but the New Bonds thus to be delivered to this Corporation shall not exceed in principal amount the sums then owed to this Corporation on account of the advances which it has made hereunder, together with any interest then accrued and unpaid thereon.

(c) In the event that Counsel for this Corporation shall have any doubt as to the legal authority of the District to issue New Bonds in exchange for some part or some class of the Deposited Securities, provision shall be made for delivery to this Corporation of New Bonds having a principal amount equal to the sums owed to this Corporation on account of the advances it has made or it is then making hereunder, upon the surrender and cancellation of only such part of the Deposited Securities as such Counsel deems the District can lawfully accept in exchange for New

(Testimony of Lewis A. Hauser.)

Bonds. Propmtly after effecting any such exchange of a part of the Deposited Securities for New Bonds, the Treasurer of this Corporation shall surrender or assign to the District without charge all of the Deposited Securities then held by this Corporation that were not previously exchanged for New Bonds.

6. Municipal Bond Counsel. In cases where New Bonds are to be issued, the District at its own expense shall employ nationally recognized municipal bond counsel satisfactory to and approved in writing by Counsel for this Corporation and shall cause such bond counsel to prepare resolutions and proceedings authorizing an issue of New Bonds bearing 4% interest, in such aggregate principal amount as may be necessary for the purpose of the proposed refinancing. Such resolutions and bonds shall comply in all respects with the provisions of Section 36, Part 4 of the Emergency Farm Mortgage Act of 1933, as amended. Such counsel shall submit drafts of such resolutions and proceedings to Counsel for this Corporation and secure their approval thereof before their adoption and upon the delivery of such New Bonds shall give this Corporation such satisfactory preliminary and final opinions as to the validity thereof [166] and the security therefor as Counsel for this Corporation may require.

(Testimony of Lewis A. Hauser.)

The District shall also furnish, at its own expense, such opinion or opinions of municipal bond counsel as may be required by and be satisfactory to Counsel for this Corporation with respect to the validity of and security for any Old Securities pledged as collateral for notes taken by this Corporation or otherwise acquired by it.

7. Date, Maturities and Interest of New Bonds. Such New Bonds shall bear such date as shall be satisfactory to Counsel for this Corporation. No part of the principal thereof shall mature during the first three (3) years after their date and such bonds shall mature thereafter in annual installments over a period of thirty (30) years, commencing at the end of the fourth (4th) year from the date they bear according to a maturity schedule satisfactory to the Division Chief. If the District may legally do so, such annual maturities, so far as practicable, shall be such that the totals of the sums payable for interest and for the retirement of bonds shall be approximately the same in each year during which there is a maturity. Interest on New Bonds is to be paid semi-annually unless the Division Chief shall otherwise direct.

8. Covenants of the District. No loan shall be made upon the terms of this resolution until after the District shall have adopted resolutions

(Testimony of Lewis A. Hauser.)

or otherwise have entered into satisfactory agreements providing that so long as any of the New Bonds or any of the Old Securities pledged with or acquired by this Corporation remain outstanding.

(a) Statutory Covenants.—The District will not issue any other bonds having security similar to that of the New Bonds or of the Old Securities pledged with or acquired by this Corporation except with the consent of this Corporation; that, in so far as it lawfully may, the District will pay to this Corporation an amount equal to the amount by which the assessments, taxes, or other charges collected by the District, exceed the costs of operation and maintenance of the project and maturities of interest and principal on its outstanding obligations, and that the District will reduce, in so far as it lawfully may, the annual taxes, assessments and other charges imposed by it for or on account of the project by an amount proportional to the reduction in the corresponding annual requirements for principal and interest of its outstanding indebtedness by reason of the operation of Section 36, Part 4 of the Emergency Farm Mortgage Act of 1933, as amended.

(b) Cash Operating Basis.—In the period prior to the first maturity on such New Bonds, or in case no New Bonds shall be issued, then

(Testimony of Lewis A. Hauser.)

in the period of three years after the first loan shall be made hereunder (or such longer period as may be fixed by the Division Chief) the District will cause to be levied and collected sufficient assessments, taxes, or other charges to pay all of its operating costs for such period, all tax anticipation obligations of every kind which it then has outstanding and all other indebtedness of the District which is then due and payable or becomes due and payable during such period, (excepting only obligations on Old Securities which are then pledged to or held by this Corporation), and in addition thereto, to leave the District at the end of such period with [167] sufficient cash on hand to pay all obligations which it should meet before the time when its next assessments or taxes become payable to the end that after the expiration of such period the District will be operated on a cash basis with no tax anticipation warrants, notes or other like obligations then outstanding. After the date when the first loan is made hereunder, the District will not incur any indebtedness of any kind unless it can pay such indebtedness at the time due from cash on hand or which it will have on hand at such time from its normal sources of revenue and it will not issue any tax anticipation warrants, notes or other obligations of any kind without first se-

(Testimony of Lewis A. Hauser.)

curing the written consent of this Corporation.

(c) Notice of Meetings.—The District will give this Corporation ample notice of any meeting of its governing body at which any matters of importance are to be acted upon, accompanied by a brief statement of the nature of the matters to be considered at such meeting, and this Corporation shall have the right to have such meeting attended by any authorized representative.

(d) Physical Conditions.—At the end of each six months' period the District will furnish this Corporation with a statement as to the physical condition of all properties owned or maintained by the District, which statement shall be signed by two of its executive officers and by the District Engineer, if it has such an employee.

(e) Annual Budget—Reserve for Interest.—In each year the District will prepare an estimate of the amounts which it will be required to pay out during each month of the following year, a statement of the cash it then has on hand, and an estimate of the cash it will receive during each month of the next year. Such estimates, particularly during the earlier years, shall provide for building up such suitable reserve as may be required by this Corporation for payment of principal and

(Testimony of Lewis A. Hauser.)

interest in bad years. Such estimates shall be submitted to this Corporation within 60 days prior to the date when the rate or rates of assessment are fixed in each year and the District agrees that in levying taxes or assessments for the following year, it will comply with all reasonable suggestions or requests made to it by this Corporation in connection therewith.

(f) Report on Assessments Levied.—Promptly after the levy of any assessments or taxes, the District will notify this Corporation of the amounts of such taxes or assessments, showing separately the amounts levied for each of its funds.

(g) Annual Reports.—Promptly upon the making of any audit of the business of the District for any year pursuant to the terms of any statute, rule or regulation applicable to such District, it will furnish this Corporation with true copies of such audit reports.

In the event that such reports shall fail to show all receipts and disbursements of the District for the preceding year, including a sparate statement of all sales of lands owned by the District, the District will, within 30 days after the close of each of its fiscal years, furnish the Corporation true and accurate reports [168] thereof. The District will also furnish this Corporation with all such other

(Testimony of Lewis A. Hauser.)

reports, as it may from time to time request in writing.

Within 30 days after the close of each of its fiscal years, the District will also give the Corporation a statement giving the name of each landowner within the District who has failed to pay any District taxes or assessments payable within the prior year, a brief description of the land subject to such taxes or assessments and a brief statement of what steps have been taken by the District or others to enforce collections thereof.

(h) Attorney for District.—In the event that the Corporation shall so request, the District at its own expense will engage any responsible attorney or attorneys designated by this Corporation and shall confer upon such attorneys full power and authority to enforce collections of any delinquent taxes or for any other purpose.

(i) Litigation. — The District shall promptly notify this Corporation of any suit or litigation which may be instituted against it.

(j) Access to Records.—The District will at all times give the Corporation full access to and copies of all records, reports and files of the District and its governing authority.

(k) Successor.—All resolutions and agreements by the District shall provide that any

(Testimony of Lewis A. Hauser.)

consents that may be given by and any rights thereby conferred upon this Corporation may be exercised by any successor to this Corporation designated by Act of Congress or by any Department of the United States Government or any corporation wholly owned by it, or by any person holding responsible office under the United States Government that may at any time be designated for that purpose by this Corporation.

9. Other Conditions Precedent. This Corporation shall be under no obligation to make any loans pursuant to this resolution unless and until the following conditions have been complied with to the satisfaction of the Division Chief:

(a) Assessments—Unless the resolutions authorizing the New Bonds shall contain satisfactory covenants that the District will at all times levy and collect sufficient assessments which together with other charges shall be sufficient to pay all expenses of operating, maintaining and repairing its works, all sums necessary for payment of interest and principal on the bonds and any other indebtedness at any time owed by the District, plus such additional amounts the Division Chief and Counsel for this Corporation may deem necessary for assurance against delinquencies in payment of taxes, and unless in addition

(Testimony of Lewis A. Hauser.)

thereto the District shall furnish this Corporation with such assurances as may be required by the Division Chief and its Counsel that so long as any of the bonds remain outstanding such assessments cannot or will not be reduced below the amounts above required by any action of the California Districts Securities Commission or by any other governmental officer or board.

(b) Cancellation of Note—Unless before or at the time of making the first such loan the District shall have procured the cancellation and surrender of the $90,000.00 note, hereinbefore referred to, held by the Palo Verde [169] Mutual Water Company.

(c) Reassessments—Unless the District shall have complied to the satisfaction of the Division Chief with any requirement he may impose for reassessment of the benefits upon the lands within such District and with any requirements that the Division Chief may impose in connection with the adjustment or collection of taxes or assessments that are now delinquent.

(d) Exclusion of Lands—Unless the District shall have complied to the satisfaction of the Division Chief with any requirements he may impose for the exclusion of lands from the District which he deems unproductive or

(Testimony of Lewis A. Hauser.)

for other reasons considers should not be included in the District.

(e) Disbursement of Monies—Committee Expenses—Unless the Division Chief is satisfied that the monies to be loaned will be equitably distributed to and among the owners of the Deposited Securities, in proportion to the loan value of the securities they have respectively deposited. The Owners' Agents shall submit to the Division Chief such statements of their expenses and of the compensation which they propose to pay to depositaries, committee members and others, as he may require. If the Division Chief shall notify such Agents in writing that he disapproves of any such expenditures and if such Agents fail to procure such reductions in said charges as he may require, the aforesaid loan shall not be consummated.

(f) Legal Proceedings—Unless Counsel for this Corporation and the Division Chief shall be satisfied with all resolutions and proceedings incidental to the authorization and issue of any New Bonds and the Deposited Securities, with the security therefor and with all proceedings in connection with the acquisition of such obligations by this Corporation the pledging of Deposited Securities to this Corporation, the exchange of New Bonds

(Testimony of Lewis A. Hauser.)

therefor and the Cancellation of Old Securities.

(g) Representations—If any representation or statement made to this Corporation in the application for this loan or any supplement or amendment thereof, or otherwise, shall be found to be incorrect or incomplete in any material respect.

(h) Financial and Physical Conditions—If, in the judgment of the Division Chief, there shall have been any material change in the financial condition of the District or in the physical condition of its properties as theretofore represented to this Corporation.

(i) Opinion of Counsel—Unless Counsel for this Corporation shall be satisfied with all opinions rendered by municipal bond counsel as to the validity of and security for, the Deposited Securities and the New Bonds.

(j) Satisfactory Performance—Unless all terms and conditions of this resolution and of Section 36, Part 4 of the Emergency Farm Mortgage Act of 1933, as amended, shall have been complied with to the satisfaction of the Division Chief and of Counsel for this Corporation. [170]

Further Resolved, that if the Division Chief shall so request, Counsel for the Corporation shall prepare any contracts or agreements not inconsistent with

(Testimony of Lewis A. Hauser.)
this resolution, setting forth the terms and conditions under which the aforesaid loans, advances or exchanges are to be effected and when any such contracts or agreements shall have been approved by the Division Chief, and by Counsel designated for that purpose by the General Counsel for this Corporation, the Treasurer of this Corporation is authorized and directed to execute the same in the name and on behalf of this Corporation.

Further Resolved, that when said District, Owners' Agents and Consenting Owners have complied with the provisions, terms and conditions of these resolutions and of any contracts that may have been executed by the Corporation in this matter to the satisfaction of the Division Chief and of the designated counsel for this Corporation, the Treasurer of this Corporation is authorized and directed to execute all such instruments, make all loans, payments and exchanges of securities and take any other action so approved by the Division Chief and by said Counsel.

Further Resolved, that the Secretary of this Corporation is hereby authorized and directed to forward a certified copy of these resolutions to the District.

I, G. R. Cooksey, Secretary of the Reconstruction Finance Corporation, do hereby certify that the foregoing is a true and correct copy of the resolutions of its Executive Committee duly adopted at a meeting thereof, regularly convened and held on

(Testimony of Lewis A. Hauser.)
the 1st day of March 1934, at which a quorum was present and acting throughout.

In Witness Whereof I have hereunto set my hand and the seal of this Corporation this 5th day of March, 1934.

[Seal] (Signed) G. R. COOKSEY,
Secretary. [171]

It was further stipulated that following the announcement of the resolution, the district board called for an election of the voters of the district upon a refunding bond issue of $1,039,044, being the amount allowed in the resolution of the Reconstruction Finance Corporation. The bond election was held on June 15, 1934, and was carried. Throughout the summer of 1934 the district in aid of the Bondholders' Committee, which by that time had organized a private corporation known as Palo Verde Valley Properties, Inc., and which had caused the member bondholders to transfer their bonds to that corporation in exchange for stock of the corporation, pursued an effort to obtain the deposit of additional bonds by bondholders who were not members of the Committee. It was arranged that the Mutual Water Company bondholders' should receive 50 cents on the dollar for their bonds, that the holders of the bonds of the three districts should allow the difference between 25 cents and 50 cents, approximately, upon the $170,000 to be deducted

(Testimony of Lewis A. Hauser.)

from what they should receive, so that the net of bondholders of the districts after that deduction should amount to 23.248 cents per dollar of principal. The Mutual Water Company bondholders held a private mortgage on the water system and claimed a preferred position. Approach was made to the Reconstruction Finance Corporation to change the resolution of March 1, 1934, providing for a flat payment of 24.81 cents per dollar for all the bonds, but the Reconstruction Finance Corporation refused to make that modification.

As the outcome of the negotiation all bonds were deposited in escrow with the Security Bank under the two types of instructions to which Mr. Faries testified. The Reconstruction Finance Corporation, when the percentage of bonds approximated 94 per cent, determined to acquire the bonds in the manner which has been testified to by Mr. Meyer and on October 31, 1934, the Reconstruction Finance Corporation made disbursement.

Thereafter the district continued its efforts to secure [172] additional bonds to be deposited with the result that 96.76 per cent of all the bonds are in the possession of the Reconstruction Finance Corporation. As a condition to the deposit of 87 per cent of the bonds held by the Palo Verde Valley Properties, Inc., an agreement was made between the district and that corporation, which had succeeded by assignment to the so-called Florence Clark lease, whereby that lease was cancelled and ter-

(Testimony of Lewis A. Hauser.)
minated and the district assumed a small obligation, the witness thinking it was settled finally for $4,000, in favor of an agent of that corporation, whereupon the district resumed possession and control of its tax-deeded lands.

Also as a preliminary to the final disbursement by the Reconstruction Finance Corporation of approximately a million dollars or a little less, two certain agreements were executed between the Reconstruction Finance Corporation and the district both under date of August 7, 1934. The first agreement was introduced in evidence as petitioner's Exhibit 19, and it was stipulated that while it was dated August 7, 1934, it was authorized by resolution of the District board adopted on July 24, 1934, executed on August 7, 1934, and delivered to the Reconstruction Finance Corporation on August 11, 1934. Exhibit 19 is as follows:

PETITIONER'S EXHIBIT No. 19

Copy of Agreement from Minutes of Adjourned Meeting of the Board of Trustees of the Palo Verde Irrigation District of July 24, 1934.

AGREEMENT

This Agreement made as of the 7th day of August, 1934, by and between Palo Verde Irrigation District, organized under the laws of the State of California, hereinafter called "the District", and

(Testimony of Lewis A. Hauser.)
Reconstruction Finance Corporation, an agency of the United States of America, hereinafter called "R.F.C.":

Witnesseth:

Whereas, the Executive Committee of the R. F. C. duly adopted a resolution on March 1, 1934, approving a loan to the District in the total sum of $1,039,423 under a plan of refunding the in- [173] debtedness of said District, including bonds assumed by said District, in the principal sum of $4,178,330.00, together with interest unpaid on May 31, 1933 in the amount of $731,432.00; and

Whereas, the District by resolutions adopted by its board of trustees on April 17, 1934, and May 1, 1934 duly accepted and approved said plan of refunding the outstanding indebtedness of said District including bonds assumed by said District and duly accepted and approved the terms, conditions, covenants and promises set forth in said resolution of R. F. C.; and

Whereas, the District has submitted to its electors at an election duly and regularly called and held on the 4th day of June, 1934, the proposition of entering into and carrying out a contract with the R. F. C. for a loan by said R. F. C. to the District in the amount of $1,039,423.00 for the purpose of refunding the indebtedness of the District including the bonds assumed by the District and approving the terms and conditions of said refunding plan and

(Testimony of Lewis A. Hauser.)

authorizing the issuance of refunding bonds in the principal sum of $1,039,423.00; and

Whereas, more than two-thirds of the votes cast for and against said proposition at said election held on June 4, 1934 were cast in favor of said proposition and said proposition has therefore been duly approved by the electors of the District; and

Whereas, said refunding plan has further been submitted to the California Districts Securities Commission of the State of California and said California Districts Securities Commission has heretofore by orders dated May 4, 1934, and July 13, 1934 approved said refunding plan and authorized the issuance of refunding bonds in the principal amount of $1,039,423.00 to be dated and to mature and to bear interest as hereinafter more fully stated and authorizing the District to enter into an agreement with the R. F. C. covering the terms and conditions of said loan; and

Whereas, all acts, conditions and things required to exist, happen or be performed precedent to the entering into and execution of this agreement by the District have heretofore existed, happened and been performed,

Now, Therefore, it is hereby mutually covenanted and agreed as follows:

1. That R. F. C. agrees to loan an amount not to exceed $1,039,423.00 to or for the benefit of said District in accordance with and subject to the terms and conditions more fully specified in said resolu-

(Testimony of Lewis A. Hauser.)
tion of the R. F. C. dated March 1, 1934, but in the event that any of said refunding bonds are sold to purchasers other than R. F. C. the principal amount of such refunding bonds which R. F. C. is obligated to purchase shall be correspondingly reduced.

2. That the District agrees to issue or cause to be issued and to deliver to R. F. C. or its order, refunding bonds payable to bearer having a total principal amount equal to the amount so loaned by R. F. C. That said refunding bonds shall be dated July 1, 1934, shall consist of 1050 bonds numbered 1 to 1050, inclusive; shall bear interest at the rate of four per cent per annum payable semi-annually on January 1st and July 1st; shall be designated "Third Issue of Bonds (Refunding)"; and shall be of the denominations and be numbered and mature as follows, to-wit:

(Then follows schedule of bonds.) [174]

Said bonds and coupons thereon shall be payable at the office of the County Treasurer of Riverside County in the City of Riverside, California, or at the National City Bank of New York, in the Borough of Manhattan, City of New York, State of New York, at the option of the holder, in such funds as are, on the respective dates of payment of the principal and interest on the bonds, legal tender for debts due the United States of America. Said refunding bonds shall be deposited from time to time with such depositary and in such amounts as may be designated by R. F. C., and R. F. C.

(Testimony of Lewis A. Hauser.)

agrees, subject to full compliance with all the conditions and terms of the resolution of R. F. C. of March 1, 1934, to take delivery of such bonds and to provide and make available funds therefor in the amount or amounts authorized by said resolution of R. F. C. of March 1, 1934, and the District shall be entitled to receive said funds and to use the same for the purposes contemplated by said resolution of March 1, 1934, including the purchase and cancellation concurrently therewith of the old securities in such amounts as are required to be cancelled in the refunding plan set forth in said resolution of March 1, 1934; provided that R. F. C. may in the alternative, as provided for in said resolution of March 1, 1934, make its loan or loans directly to the owners' agents and consenting owners of the old securities upon receiving the note or notes of such consenting owners or owners' agent and the pledge of "old securities" in such amount as should otherwise be cancelled for a loan of like amount to the District under the refunding plan, and thereupon R. F. C. shall have the right to exchange such "old securities" for refunding bonds and all other rights as more fully provided for in said resolution of March 1, 1934.

3. Said bonds shall constitute the general obligations of the District and shall be negotiable, serial, coupon bonds, payable to bearer, and shall be registerable at the option of the holder as to principal and interest.

(Testimony of Lewis A. Hauser.)

4. That as provided in the resolution of the Executive Committee of R. F. C. adopted March 1, 1934, said District hereby promises, covenants and agrees with said R. F. C. that so long as any of said refunding bonds, or any of the old securities pledged to or acquired by R. F. C. pursuant to the aforesaid resolution remain outstanding said District will duly and fully fulfill, comply with and carry out all the terms and conditions on its part to be fulfilled, complied with and carried out under the terms and conditions of said corporation resolution, and further that said District will at all times levy and collect sufficient assessments which together with other charges shall be sufficient to pay all expenses of operation, maintenance and repairing its works and to provide all sums necessary for payment of interest and principal on the bonds and *and* any other indebtedness at any time owed by the District, and, in addition thereto, the District agrees that so long as any of the refunding bonds, or any of the old securities pledged to or acquired by R. F. C. pursuant to the aforesaid resolution, remain outstanding, such assessments cannot or will not be reduced below the amounts above required by any action of the California District Securities Commission, or by any other governmental officer of board.

That the District shall be obligated and bound for the payment of said refunding bonds in accordance with the terms of said plan and all the terms and

(Testimony of Lewis A. Hauser.)
conditions on the part of the District to be kept and performed are hereby incorporated herein and made a part hereof.

5. That the District hereby agrees to create and maintain [175] a separate fund as a reserve for contingencies. That in each year, for a period of five (5) years, beginning in the year 1936, said District shall pay into such fund the annual amount of $12,044.00. That moneys in such fund shall be used solely and only to the extent necessary to prevent a default in the payment of the interest on and principal of the bonds, until the amount in such fund is sufficient to service, both as to principal and interest, all of the refunding bonds then outstanding to the maturity thereof. That the amount of any moneys used in any year from such reserve fund to prevent any such default shall be paid into said fund in the next year, and said fund shall be secured at all times in the manner provided by the law of the State of California.

6. That the District covenants and agreees that it will not issue any other bonds having security similar to that of the refunding bonds or any of the old securities pledged to or acquired by R. F. C. pursuant to the aforesaid resolution, except with the consent of said corporation; that in so far as said District may lawfully do so, it will pay to said R. F. C. an amount equal to the amount by which the assessements, taxes or other charges collected by said District exceeds the costs of operation and

(Testimony of Lewis A. Hauser.)
maintenance of the project and maturities of interest and principal on its outstanding obligations, and that said District will reduce, in so far as it lawfully may, the annual taxes, assessments and other charges imposed by it for and on account of the project, by the amount proportional to the reduction in the corresponding annual requirements for principal and interest of its outstanding indebtedness by reason of the operation of Section 36, Part 4 of the Emergency Farm Mortgage Act of 1933, as amended.

7. That the District agrees that in the period prior to the first maturity on such refunding bonds, the District will cause to be levied and collected sufficient assessments, taxes or other charges to pay all of its operating costs for such period, all tax anticipation obligations of every kind which are then outstanding and all other indebtedness of the District which is then due and payable or to become due and payable during such period, and, in addition thereto, to leave the District at the end of such period with sufficient cash on hand to pay all obligations which it should meet before the time when its next assessments or taxes become payable, to the end that after the expiration of such period the District will be operated on a cash basis with no tax anticipation warrants, notes or other like obligations then outstanding. That after the date when the first loan is made hereunder, the District will not incur any indebtedness of any kind unless it

(Testimony of Lewis A. Hauser.)

can pay such indebtedness at the time when due with cash on hand or which it will have on hand at such time from its normal sources of revenue, and it will not issue any tax anticipation warrants, notes or obligations of any kind without first securing the consent of the R. F. C.

8. That the District will maintain its irrigation system in good condition and will operate the same in an efficient manner.

9. That the District further covenants and agrees to do and perform all things required to be done or performed by it under said resolution of R. F. C. of March 1, 1934, in the time, manner and form as therein more fully specified.

10. R. F. C. shall not be obligated to purchase any of said bonds until it has been furnished, at no cost to it, with two signed counterparts of a final opinion by Messrs. O'Melveny, Tuller & Myers in form previously to be approved by said R. F. C. If R. F. C. [176] shall not be satisfied as to all legal matters and proceedings affecting the bonds and the security therefor, R. F. C. shall not be under obligation to purchase any of said bonds.

11. That the District shall promptly work out and submit, with opinion of municipal bond counsel, to the Chief of the Drainage, Irrigation and Levee Division of the R. F. C. a detailed plan for handling delinquent assessments and cleaning up all outstanding delinquencies, with due regard to the respective rights, interests and equities of all taxpayers, as

(Testimony of Lewis A. Hauser.)

fully as the controlling laws and existing circumstances and conditions justify, and that, when such plan has been approved by said Division Chief, then the Board of Trustees of the District shall be authorized and empowered to carry said plan into effect and to make and execute any deeds, conveyances, leases, options and contracts of sale of any and all property, real, personal or mixed, owned by or thereafter acquired by said District, as provided in said plan.

12. This contract is not for the benefit of any person or corporation other than the parties hereto, their respective successors and assigns, and neither the holders of the bonds of the District now outstanding nor any other except the parties hereto, their respective successors or assigns, shall have any right or interest in or under this contract except as expressly provided for herein. This contract shall be binding upon and inure to the benefit of the parties hereto and their successors and assigns, and shall inure to the benefit of the holders from time to time of any of the refunding bonds; provided, however, that no rights of the District hereunder shall be assignable except with the prior consent of R. F. C. All obligations of the District hereunder shall cease upon payment in full of the refunding bonds. This contract shall be governed by and construed in accordance with the laws of the State of California.

(Testimony of Lewis A. Hauser.)

In Witness Whereof, said Palo Verde Irrigation District and said R. F. C. have respectively caused this agreement to be duly executed as of the day and year first above written.

PALO VERDE IRRIGATION DISTRICT

By ....

President of the Board of Trustees of said District.

By ....

Secretary of the Board of Trustees of said District.

RECONSTRUCTION FINANCE CORPORATION

An Agency of the United States of America

By ....

The second agreement was approved at a District board meeting on August 7, 1934, and executed and dated on that date, delivered to the Reconstruction Finance Corporation also on August 11, 1934, and was offered in evidence as petitioner's Exhibit 20, reading as follows: [177]

(Testimony of Lewis A. Hauser.)

PETITIONER'S EXHIBIT NO. 20

AGREEMENT

This Agreement, made this 7th day of August, 1934, by and between Reconstruction Finance Corporation, hereinafter referred to as the Corporation and Palo Verde Irrigation District, a public corporation, organized under the laws of the State of California, hereinafter referred to as the District,

Witnesseth:

Whereas, the Corporation has heretofore duly authorized a loan to or for the benefit of the District under the provisions of Section 36, Part 4, of the Emergency Farm Mortgage Act of 1933, as amended, to enable the District to reduce and refinance its outstanding indebtedness evidenced by Old Securities referred to in the resolution authorizing said loan, and said loan has heretofore, by resolution of the District, been duly accepted and the District therein consented and agreed to carry out the terms and conditions set forth in said resolution of the Corporation authorizing said loan; and

Whereas, said resolution authorizing said loan contemplates that said indebtedness will be reduced and refinanced by the Corporation's acquiring the Old Securities therein referred to for the amount set forth in said resolution, and thereafter exchanging said Old Securities for New Bonds, to be issued by the District and delivered to the Corporation as provided in said resolution, having a principal amount equal to the sum disbursed by the

(Testimony of Lewis A. Hauser.)

Corporation and carrying interest at the rate of four per cent per annum; and

Whereas, the District represents that over 93½ per cent of said Old Securities have been deposited and now are available for refinancing on the basis provided for in said resolution authorizing said loan; and

Whereas, the District represents that it desires and intends to take and complete, and that it will expeditiously and in good faith take and complete, all proceedings necessary or appro- [178] priate to bring about the participation of the Old Securities that have not been made available for refinancing; and

Whereas, the District desires and has requested the Corporation to make disbursements from said loan for the purpose of acquiring the Old Securities available for refinancing prior to the time the remaining Old Securities are made available for such purpose;

Now, Therefore, it is hereby agreed by and between the parties hereto as follows:

1. The Corporation may make disbursements at any time it is willing to do so for the purpose of acquiring any portion of the Old Securities available for refinancing, or rights or interests in or to such Old Securities, on the basis of the payments to be made for Old Securities under the provisions of said resolution, and if and when such disbursements are made (whether made to the District or to the

(Testimony of Lewis A. Hauser.)
holders or representatives of the holders of said Old Securities, and whether made upon promissory notes collateralized by such Old Securities or through the purchase of such Old Securities) they shall be and constitute advances from the loan authorized in said resolution.

2. Until the Old Securities acquired and held by the Corporation by reason of or in connection with such disbursements are exchanged for New Bonds issued by the District, or are otherwise refinanced as provided in said resolution, they shall at all times continue to be and constitute obligations of the District for the full face amount thereof.

3. When all of the Old Securities are made available for refinancing and are acquired by the Corporation the reduction in the District's indebtedness will be effected to the extent and in the manner provided in said resolution authorizing said loan, and the parties hereto will do all acts and take all steps and proceedings necessary or appropriate to facilitate and accomplish [179] expeditiously such result.

4. Prior to the time all of the Old Securities are available for refinancing or are acquired by the Corporation, the Corporation may, at any time, if it so elects at its sole discretion, require that the District's indebtedness be reduced in the manner provided in said resolution and to the extent that such result can be accomplished by subjecting the

(Testimony of Lewis A. Hauser.)

proportion of Old Securities held by the Corporation to the refinancing plan provided for in said resolution, and in such event the parties hereto will do all acts and take all steps and proceedings necessary or appropriate to facilitate and accomplish expeditiously such result.

5. The District will forthwith proceed to take and complete all acts and proceedings to be done or taken by it under the terms and conditions of said resolution so far as such acts and proceedings can be taken and completed during the time non-participating Old Securities remain outstanding or prior to the time the Corporation elects to close the loan regardless of the non-participation of such outstanding Old Securities, to the end that the least possible delays will be required or will result in the final closing of the loan.

6. During the time the Corporation holds any of said Old Securities and the same have not been refinanced by the issuance and delivery of New Bonds or as otherwise provided in said resolution, the District will annually levy and collect taxes and assessments in sufficient amounts to pay, and will pay, the Corporation each year a sum that will yield to the Corporation four per cent upon the total amount of the disbursements made by it in acquiring such Old Securities, or rights or interests in or to such Old Securities; provided, that the Corporation can during any such time require the District to pay any larger sum, not exceeding the amount due on said Old Securities according to the terms thereof, in

(Testimony of Lewis A. Hauser.)
which event the District will so levy, collect [180] and pay such larger sum.

7. The Corporation may at any time advance such sum or sums to the District to enable it to meet and pay expenses incurred in connection with its refinancing program as may be requested by the District and approved by the Division Chief, and such advances shall be deemed advances from said loan and included in sums disbursed by the Corporation in acquiring Old Securities, or rights or interests in or to Old Securities.

In Witness Whereof the parties hereto have caused these presents to be executed by their proper officers, first duly authorized and their respective corporate seals to be hereto affixed, the day and year first above written.

RECONSTRUCTION FINANCE CORPORATION,

By ....

PALO VERDE IRRIGATION DISTRICT,

By ....,
Its Vice President.

By ....,
Its Secretary.

It was further stipulated that in May of 1934 the District issued a printed circular letter to all bondholders of which it had knowledge advising

(Testimony of Lewis A. Hauser.)
them of the proposed loan of the Reconstruction Finance Corporation, requesting that they deposit their bonds and take the benefits of the plan, and stating that the Palo Verde Valley Properties, Inc., had been appointed by the district as its agent for the purpose of informing the bondholders and discussing with them the deposit of the bonds.

Mr. Shaw stated that it was his understanding that the Palo Verde Valley Properties, Inc., received a permit from the Corporation Commissioner to issue a certain number of shares of stock for each $1000 bond and that all the bonds which the corporation acquired were exchanged for stock on a ratable basis and that this involved substantially 87 per cent of the outstanding bonds of the Palo Verde Irrigation District. [181]

One of the printed letters sent out by the Palo Verde Irrigation District to the bondholders was introduced in evidence as respondents' Exhibit B, reading as follows:

This was a printed letter headed "Palo Verde Irrigation District, Blythe, California, dated April 16, 1934, and directed to holders of bonds of Palo Verde Irrigation District, Palo Verde Joint Levee District, and/or Palo Verde Drainage District. This letter made some statements regarding the default of the district in payment of its bond obligations and stated "obviously some corrective measure was necessary to prevent a complete loss of the bondholders' investments and for this reason the

(Testimony of Lewis A. Hauser.)
plan of reorganization of September 16, 1932, was finally adopted." * * * and then the letter went on as follows:

RESPONDENT'S EXHIBIT B

As you probably know, under the Emergency Farm Mortgage Act of 1933 the Reconstruction Finance Corporation was authorized to loan to Irrigation, Levee, Drainage and similar districts, for the purpose of refinancing their outstanding indebtedness certain sums not exceeding in the aggregate $50,000,000.

Naturally there have been many applications for such loans and we are pleased to advise you that after investigation and appraisal of our District, the R.F.C. has approved our application for such loan. As a result of negotiations with representatives of all groups of bondholders the district is now in a position to make the following cash offer for your bonds:

1. The payment for bonds of the Palo Verde Irrigation District, Palo Verde Joint Levee District and/or Palo Verde Drainage District shall be 23.248 cents for each dollar of principal amount of such bonds deposited at the time the R.F.C. makes its first loan, provided that all unpaid coupons maturing subsequent to October 30, 1929, are attached.

2. The payment for bonds not deposited at the time when such first loan is made but which are subsequently deposited within such time or times

(Testimony of Lewis A. Hauser.)

as may be fixed or approved by the R.F.C., shall be 21.248 cents for each dollar of principal amount of such bonds, provided that all unpaid coupons maturing subsequent to October 30, 1929, are attached.

The time at which the R.F.C. will furnish the first part of the money to be loaned (above specified as "first loan") is uncertain and it is therefore desirable that bonds still outstanding be deposited as early as possible.

In the event that any of the unpaid coupons maturing subsequent to October 30th, 1929, are not attached to such bonds, said loan agreement contemplates that there be deducted from the payment under either of the above items such amount as may be determined upon by the Division Chief of the Drainage, Levee and Irrigation Division of the R.F.C. [182]

We are gratified that our application has received early consideration and approval and in order that you may fully realize the situation, particularly as it affects California districts, we are quoting below from a report of the R.F.C. dated February 12, 1934:

(Testimony of Lewis A. Hauser.)

California Districts

Number of districts applying for loans	43
Outstanding indebtedness of districts making application	$55,594,875.46
Gross amount of loans applied for	30,853,201.60
Number of loans approved	7
Outstanding indebtedness of districts approved	$10,370,790.17
Gross amount of loans approved	3,736,579.50

These figures include the application of the Palo Verde District.

It is evident, we believe, from the foregoing that if the offer made to us is not accepted within the time specified by the R.F.C., the offer may be withdrawn and funds allotted to us used elsewhere as many federal loans heretofore authorized have already been cancelled for lack of progress by the district to which the allotment had been authorized. Effort has been made to have the amount offered for your bonds increased but such effort has been unsuccessful and we have been advised that the R.F.C. does not consider any increase warranted.

Under the terms of the loan granted by the R.F.C., all details in connection with the loan must be completed and the funds disbursed on or before June 30, 1934, so that your immediate cooperation is necessary if this further effort in your behalf is

(Testimony of Lewis A. Hauser.)

to be successfully completed. It will be necessary for this district to take certain procedural steps, including the voting of a refunding bond issue, which will require close to two months before the loan can be completed. Consequently the utmost of speed is requisite.

In order to consummate the loan as quickly as possible, the District, by resolution of its Board of Trustees, has appointed Palo Verde Valley Properties, Inc., whose address is 1112 Haas Building, Los Angeles, to act as its agent for the purpose of answering such inquiry as may be made concerning the deposit of bonds or other matters relative to the loan.

An exactly similar offer is being made to those bondholders who have previously deposited their bonds and it is believed such offer will be accepted, and that as part of said acceptance the lease option agreement of August 18, 1932, which is fully described in the plan of reorganization of September 16, 1932, will be cancelled by authority of such other bondholders. We therefore urge that you immediately deposit your bonds with the Security-First National Bank of Los Angeles, Corporate Trust Department, Sixth and Spring Streets, Los Angeles, California, which has been constituted the depositary for the purpose of consummating the loan. The enclosed transmittal letter represents all of the terms and conditions under which the deposit

(Testimony of Lewis A. Hauser.)

is made. Please fill in, sign and forward promptly as requested above.

Yours very truly,

PALO VERDE IRRIGATION DISTRICT, [183]

By L. A. HAUSER, President;
DAVID DARLING,
R. H. EHLDERS,
WAYNE H. FISHER,
A. E. PETITT,
TONY SEELEY,
W. G. SHELLENBERGER.

A copy of another form letter sent out by the district generally amongst the bondholders was introduced in evidence as respondents' Exhibit C. This letter repeated the offer mentioned in the letter of April 16, 1934, urged bondholders to deposit their bonds, and stated:

RESPONDENT'S EXHIBIT C

We have now been advised that the R.F.C. proposes to advance funds to make payments as outlined above as soon as a sufficient amount of old bonds have been deposited to meet the requirements of the Division Chief of the Drainage, Levee and Irrigation Division of the R.F.C. We have not been advised as to the percentage of outstanding bonds which must be deposited, but were advised just re-

(Testimony of Lewis A. Hauser.)
cently, when close to 90% of the bonds had been deposited that this was not sufficient to satisfy the R.F.C. Approximately 91% of this district's bonds have now been so deposited and we are hopeful that sufficient additional bonds will be deposited so that disbursement may be made prior to June 30, 1934.

If you do not deposit your bonds with the bank at once, one of two results will occur:

Either (1) the R.F.C. will be satisfied to make its first loan upon the basis of other bonds so deposited and take over such bonds, in which event you will thereafter be able to turn in your bonds for only 21.248 cents per dollar instead of 23.248 cents per dollar, and will thereby lose $20.00 per $1,000 bond; or (2) The R.F.C. will not be satisfied to make such loan and will be apt to cancel the loan. [184]

The witness, Mr. Hauser, further testified that copies of the two letters introduced as respondents' Exhibit B and C were sent out only to holders of bonds of the Levee, Drainage and Irrigation Districts and not to holders of the Mutual Water Company bonds.

C. P. MAHONEY

was called as a witness by the petitioner and testified that he had been chief engineer and manager of the Palo Verde Irrigation District since 1928. His qualifications as a hydraulic engineer were stipulated. He identified a map of the Palo Verde Valley.

Subject to the objection of respondents that it was immaterial, it was stipulated that the Colorado River is the eastern boundary of the State of California and in generations past has come thru a comparatively narrow channel below the town of Parker, Arizona, about 50 miles north of the Palo Verde Irrigation District. From the intake of the district the valley has widened out to a distance between a high mesa on the Arizona side and a mesa on the California side about 80 feet above the level of the valley so that the river has wandered over all of this area which now constitutes the Palo Verde Valley. From about 1856 on, the river has confined its channel largely to the area between the district levees and the Arizona mesa. In so doing it has deposited silt on the eastern edge until it has filled its channel up above the level of the adjacent Palo Verde Valley. To protect the valley against floods, a main levee of earth from 6 to 12 feet high and 20 to 25 feet in width has been constructed for approximately 35 miles from the intake down to the southerly end of the valley.

An irrigation system has been constructed in the valley consisting of about 200 miles of unlined canals. A suction dredge removes silt from irriga-

(Testimony of C. P. Mahoney.)

tion water. The dredge cost approximately $100,000. The third system which is operated by the district is a drainage system consisting of 65 miles of dug drains which are deep open ditches and 10 miles of natural channels that are used [185] as surface drains. The drainage system was installed commencing in 1921. (End of Stipulation.)

The drainage canals are now in very poor condition. Relative to the ground level, the average depth to ground water is now slightly less than 6 feet in the district. In many places where old river channels have been farmed the ground water table has come to the surface and prevented the raising of crops.

A map of the district identified by the witness was introduced as petitioner's Exhibit 21.

The water from the river has broken through the levee at numerous times. The drainage canals should be dredged and cleaned and otherwise repaired at a cost approximating $50,000. The present drainage system is believed to be sufficient for approximately 35,000 acres in cultivation. If there are more acres some of the drains should be extended and laterals constructed. The wooden structures appurtenant to the canal system are in generally poor condition and should be replaced with concrete, at a cost of approximately $25,000 for replacements needed now. The district has been patching up these wooden structures during the lean years since 1930. Additional canals for new lands should be constructed at a

(Testimony of C. P. Mahoney.)
cost of approximately $5,000. There are also lands outside the levee but inside the district which are being improved and which will require a canal at a cost of $6,000. All canal bridges in the valley should be replaced. The condition of district operating equipment is generally poor and additional equipment is needed. The District is still operating ten Model T Ford trucks dating from 1917 to 1927. Approximately $10,000 to $12,000 is needed for replacement of equipment, excluding drag line and dredging equipment. The Colorado River is showing a tendency to meander since Boulder Dam has been built and has eroded the levees at some places. Since the building of the Boulder Dam, the silt content of the river has been 25 per cent less in coarse sand and 50 to 75 per cent less in [186] finer silt. The river picks up silt from its channel below Boulder Dam. The district is able to remove the bulk of the coarse silt in a settling canal. When there was an appreciable quantity of fine silt in the canal water it was distributed over the farm lands generally. Expenditures should be made to repair the levees and the river should be controlled by cutting new channels. Approximately $5,000 is needed at this time for river control and levee replacement and repairs. A tabulation of figures testified to by the witness was introduced in evidence as petitioner's Exhibit 22. If the farmers should abandon their lands and the district's works were not used and maintained for a year's time the cost of reconstruc-

(Testimony of C. P. Mahoney.)
tion and reconditioning would amount to between a half a million and a million dollars. It is anticipated that sometime in the future the Colorado River being cleared of silt by the Boulder Dam, the clear water will eventually scour and lower the riverbed and a weir or dam at the Palo Verde District intake will have to be constructed to hold the river level high enough to get water into the Palo Verde intake at a cost of about half a million dollars. There is being constructed in the river channel below the Palo Verde Valley the Imperial Dam, and it is anticipated that eventually that will cause the river grade at the lower end of the valley to raise, creating a drainage difficulty and may eventually require the pumping of the drainage water of the valley back into the river whereas it flows by gravity now. The cost of such works to pump the drainage water back into the river was approximated at $100,000 at one time but the estimate was not based on a thorough investigation.

It was stipulated that in 1928 the valley experienced a severe and continued water shortage due largely to the fact that the silt cleaning operation in the main canal and in lateral canals had not been carried on adequately. There was a difference in opinion amongst various individuals in the valley as to whether [187] the silting of the canals and the water shortage was due to engineering errors or because funds did not exist in the district's treasury. The district then borrowed approximately $90,-

(Testimony of C. P. Mahoney.)
000 from the Palo Verde Mutual Water Company and gave its promissory note therefor which sum was used largely in the construction of the suction dredge to remove silt. (End of stipulation.)

The witness further testified that in 1930 a group of taxpayers of the district contributed a sum approximating $70,000 to three trustees which was used to cash district warrants for maintenance and operation, and those warrants have never been paid nor have they been turned in for payment.

It was further stipulated that during the year 1933 the district compromised a tax dispute with the Santa Fe Railroad Company whereby the railroad paid the district $40,000 which was used during 1930 for operation and maintenance of the district.

It was further stipulated that after the default of the district, the district sold to the Department of Finance of the State of California bonds of the district in the amount of $15,000 which had never theretofore been issued, the State having the knowledge that the district was then in default since May 1, 1930, upon its bond issues. This sum of $15,000 was used for operation and maintenance during the year 1930. Subject to the objection of respondents that it was immaterial, it was stipulated that in 1931 the operation of the district was carried on by means of a water toll. That from 1927 and 1928 and on, the district progressively reduced its operation and maintenance charges by reduction of wages, and other economies. For the last four or

(Testimony of C. P. Mahoney.)

five years operation and maintenance has cost less than half the former costs. In 1927 the State treasurer of California had accepted and held as security for deposit of state funds in banks bonds of the Palo Verde Valley Irrigation District in the amount of $99,000. (End of stipulation.) [188]

The witness further testified that not all of the irrigation structures are wooden structures and there are some concrete structures. A picture of the concrete headgate at the river was introduced in evidence as respondents' Exhibit D. If the capital expenditures were made to which the witness testified they would take care of the situation for about five years and if the expenditures were made now only about one-tenth of the amount necessary now would be required for each succeeding year. There are 90,000 acres in the district of which 32,000 are now being farmed. If the entire needed capital expenditures were made at this time, it would cost about $3.25 an acre for the farming land. The district has not assessed other than farm lands for water toll. The condition of the cotton crop has become progressively bad for the last five or six years. About 3,000 people live in the valley. In the spring of 1934 there were approximately 22,000 and some odd hundred acres in cultivation, and the acreage has increased since that time about 10,000 acres. At least 100 new houses have been built in the last three years, and there are no vacant houses in the town of Blythe. There were a little over a thousand people in the town of Blythe in 1930. There is a

(Testimony of C. P. Mahoney.)
creamery at the town of Blythe. Alfalfa seed is produced in the valley there being about 4,000 to 5,000 acres devoted to alfalfa seed this year. In other words, about 15 per cent of the whole district farmed area is devoted to alfalfa seed. There are between 100 to 200 acres in pecans in the district. The district has filings on the river water rights dating back to 1878, and subsequently. Blythe is located on one of the transcontinental highways and there is a fairly large interstate travel through there. The district made a crop survey and report during the summer of 1937. This survey and report was introduced in evidence as respondents' Exhibit E, reading as follows: [189]

RESPONDENT'S EXHIBIT E

1937 Crop Report

	Acres
Alfalfa	10,326
Barley	465
Cotton	17,318
Bermuda Grass	293
Hemp	78
Corn	1,878
Wheat	190
Melons	30
Sweet Potatoes	5
Cantaloupes	96
Oats	265
Pecans	200
Total	31,171

(Testimony of C. P. Mahoney.)

Crop followed by another crop:

Oats	57
Wheat	1,089
Barley	645
Pecans	80
	1,871

There are a number of apiaries around the valley and there is a portable extracting plant that is used by one man who owns a number of apiaries.

There has been a recent demand on the district to supply irrigation water for lands inside the district but outside the levees and some attempt has been made to supply such water. Approximately 6,000 acres have been added to the district within the last year or two under an agreement whereby the owners of the lands were to advance a certain portion of the cost of the canal, that money to be credited to their account and available as water toll for their land to a certain extent. The resulting land development more or less guarantees the district that they will obtain from that land the complete expenditure over a relatively short [190] period of time. Such landowners have agreed to take care of the maintenance and operation of the extended canal. The stands of jigaria and milo maize seem normal this year but the witness did not know if it was true that this year there had been produced in the valley one of the finest crops of jigaria and mib that they have had in the valley at any time.

(Testimony of C. P. Mahoney.)

Pages 327 to 334 of Bulletin No. 21, Irrigation Districts in California, by Frank Adams, published by the Department of Public Works of California, Division of Engineering and Irrigation, was introduced in evidence as respondents' Exhibit F. This exhibit gives a history of the Palo Verde Irrigation District and since the bulletin from which the exhibit was taken is available generally the exhibit is not here copied.

The beehives are along the mesa and outside of the district. About 385 acres of the land which was annexed to the district this year has been cultivated and irrigated.

O. W. MALMGREN

was called as a witness by petitioner and testified that he has been assistant secretary of the Palo Verde Irrigation District since 1924 and collector since 1927 and in charge of the office and records of the district.

A schedule of bond principal and interest amounts of the original issues of bonds in each of the years 1930 to 1962 was introduced in evidence as petitioner's Exhibit 23 over the objection of respondents that the exhibit assumed facts not in evidence, namely that the bonds described are shown as outstanding and unpaid. This schedule covers bonds of Palo Verde Mutual Water Company, Palo Verde Joint Levee District, Palo Verde Drainage District, and Palo Verde Irrigation District. So far as the

(Testimony of O. W. Malmgren.)
witness knows, none of the bonds in the schedule have been delivered to the County Treasurer but coupons have been stamped paid and delivered to the County Treasurer. [191]

A schedule showing comparatively by years the crops irrigated in the valley from the year 1920 to and including the year of 1936 excepting 1927 was introduced in evidence as petitioner's Exhibit 24, reading as follows:

PETITIONER'S EXHIBIT NO. 24

PALO VERDE IRRIGATION DISTRICT
COMPARATIVE CROP REPORT, 1920 TO 1936,
WITH EXCEPTION OF 1927

Crops	1920	1921	1922	1923	1924	1925	1926	1928
	acres							
Cotton	23,438	14,896	16,247	19,700	22,788	24,046	22,260	23,262
Alfalfa	4,684	5,389	6,247	5,402	5,060	6,451	6,410	4,746
Grain	1,554	5,024	3,300	2,520	1,219	1,335	1,352	1,042
Misc.	1,042	2,067	2,862	2,402	1,708	1,772	6,113	1,158
Totals	30,718	27,376	28,656	30,024	30,775	33,604	36,135	30,208
Percentage of peak acreage of 1926	85%	76%	79%	83%	85%	93%	100%	84%

Crops	1929	1930	1931	1932	1933	1934	1935	1936
Cotton	23,180	16,890	13,811	5,309	9,061	10,779	8,761	14,561
Alfalfa	4,843	6,944	9,656	11,175	8,807	7,920	8,805	9,632
Grain	1,287	2,134	2,470	3,608	3,011	2,482	6,862	4,979
Misc.	3,083	70	411	1,609	238	362	536	632
Totals	32,393	26,038	26,348	21,701	21,117	21,543	24,964	29,804
Percentage of peak acreage of 1926	90%	72%	73%	60%	58%	60%	69%	82½%

(Testimony of O. W. Malmgren.)

A statement of assessments, collections, and delinquencies for the tax years 1927, 1928 to and including the tax year 1936, 1937, reflecting assessments on both real property and improvements was introduced in evidence as petitioner's Exhibit 25, reading as follows: [192]

PETITIONER'S EXHIBIT NO. 25

PALO VERDE IRRIGATION DISTRICT
COMPARATIVE STATEMENT OF ASSESSMENT, COLLECTIONS AND DELINQUENCIES

	1927-28	1928-29	1929-30	1930-31	1931-32
Total Assessed Valuation	$5,067,435	$4,974,780	$4,908,960	$3,898,650	$3,363,480
Rates per $100 Valuation	2.88 to 13.84	3,85 to 17.34	3,72 to 16.95	3.82 to 9.40	4.17 to 10.20
Total amt. of Assmt.	613,957	758,365	731,665	357,945	430,378
Collections as of last Monday in April:					
Amount Collected	$452,038	$519,537	$323,679	$9,367	$3,085
Percentage Collected	73.63	68.51	44.24	2.62	.72
Delinquencies as of last Monday in April:					
Amount Uncollected	$161,920	$238,828	$407,976	$348,578	$427,293
Percentage Uncollected	26.37	31.49	55.76	97.38	99.28

(Testimony of O. W. Malmgren.)

	1932-33	1933-34	1934-35	1935-36	1936-37
Total Assessed Valuation	$2,817,200	$2,472,860	$2,416,860	$2,987,575	$2,942,240
Rates per $100 Valuation	4.71 to 13.77	No Assmt. Levied	2.50	1.90	1.75
Total amt. of Assmt.	377,168		60,394	56,763	51,484
Collections as of last Monday in April:					
Amount Collected	$2,979		$53,445	$52,815	$48,436
Percentage Collected	.79		88.50	93.04	94.07
Delinquencies as of last Monday in April:					
Amount Uncollected	$374,189		$6,949	$3,948	$3,048
Percentage Uncollected	99.21		11.50	6.96	5.93

[193]

The witness further testified that for the years 1927, 1928, to and including 1932, 1933 the higher rates per hundred valuation was levied on most of the area of the district and included property which was situated in the Levee, Drainage, and Irrigation Districts. The smaller rates were only levied upon the area which was originally in the Levee district and not in the Drainage district or vice versa. The same explanation applies to the rates for 1929 and 1930. No assessment was levied in 1933-1934.

A comparative statement of unpaid tax sale certificates covering the years 1927 to 1935 inclusive was introduced in evidence as petitioner's Exhibit 26, as follows:

(Testimony of O. W. Malmgren.)

PETITIONER'S EXHIBIT NO. 26

PALO VERDE IRRIGATION DISTRICT
COMPARATIVE STATEMENT OF UNPAID TAX
SALE CERTIFICATES

	1927	1928	1929
Original Tax Sale Certificates	$175,161.70	$256,147.80	$445,285.26
January 1, 1929			
Total Unpaid	173,271.11		
Percentage Unpaid	98.9%		
January 1, 1930			
Total Unpaid	170,603.80	253,566.85	
Percentage Unpaid	97.4%	98.9%	
January 1, 1931			
Total Unpaid	170,561.68	252,281.47	442,233.75
Percentage Unpaid	97.4%	98.5%	99.3%
January 1, 1932			
Total Unpaid	170,182.22	251,899.53	440,901.61
Percentage Unpaid	97.2%	99.3%	99.0%
January 1, 1933			
Total Unpaid	170,022.18	251,828.91	440,851.62
Percentage Unpaid	97.1%	98.3%	99.0%
January 1, 1934			
Total Unpaid	170,022.18	251,823.91	440,851.62
Percentage Unpaid	97.1%	98.3%	99.0%
January 1, 1935			
Total Unpaid	170,022.18	251,823.91	440,844.08
Percentage Unpaid	97.1%	98.3%	99.0%
January 1, 1936			
Total Unpaid	170,022.18	251,823.91	440,884.08
Percentage Unpaid	97.1%	98.3%	99.0%
January 1, 1937			
Total Unpaid	170,022.18	251,823.91	440,844.08
Percentage Unpaid	97.1%	98.3%	99%

[194]

(Testimony of O. W. Malmgren.)

	1930	1931	1932
Original Tax Sale Certificates	$384,009.93	$449,854.42	$393,786.87
January 1, 1929			
Total Unpaid			
Percentage Unpaid			
January 1, 1930			
Total Unpaid			
Percentage Unpaid			
January 1, 1931			
Total Unpaid			
Percentage Unpaid			
January 1, 1932			
Total Unpaid	383,868.44		
Percentage Unpaid	99.9%		
Jauuary 1, 1933			
Total Unpaid	383,577.47	449,747.96	
Percentage Unpaid	99.8%	99.9%	
January 1, 1934			
Total Unpaid	383,549.74	449,712.00	393,747.16
Percentage Unpaid	99.8%	99.9%	99.9%
January 1, 1935			
Total Unpaid	383,541.42	449,663.23	393,682.02
Percentage Unpaid	99.8%	99.9%	99.9%
January 1, 1936			
Total Unpaid	383,541.42	449,663.23	393,682.02
Percentage Unpaid	99.8%	99.9%	99.9%
January 1, 1937			
Total Unpaid	383,541.42	449,663.23	393,682.02
Percentage Unpaid	99.8%	99.9%	99%

[195]

(Testimony of O. W. Malmgren.)

	1933	1934	1935
Original Tax Sale Certificates	No Assessment	$6,012.91	$3,625.27
January 1, 1929			
Total Unpaid			
Percentage Unpaid			
January 1, 1930			
Total Unpaid			
Percentage Unpaid			
January 1, 1931			
Total Unpaid			
Percentage Unpaid			
January 1, 1932			
Total Unpaid			
Percentage Unpaid			
January 1, 1933			
Total Unpaid			
Percentage Unpaid			
January 1, 1934			
Total Unpaid			
Percentage Unpaid			
January 1, 1935			
Total Unpaid			
Percentage Unpaid			
January 1, 1936			
Total Unpaid	No	6,010.87	
Percentage Unpaid	No	99.9%	
January 1, 1937			
Total Unpaid	No	6,010.87	3,625.27
Percentage Unpaid	No	99.9%	100%

The witness further testified that it was his practice after the delinquencies each year to issue a tax sale certificate to the district and that none of this tax delinquent land is sold to purchasers other than

(Testimony of O. W. Malmgren.)
the district. Referring to the statutes adopted from 1933 on, permitting redemption from irrigation district assessments under what are called the ten-year plan and the four-year plan, no redemptions have been made under the four-year plan and the amount paid under the ten-year plan is $407.56. (Stat. 1933, Chapter 835 and Stat. 1934, Chapter 7.) A schedule of such redemptions was introduced in evidence as petitioner's Exhibit 27, reading as follows: [196]

PETITIONER'S EXHIBIT NO. 27

Palo Verde Irrigation District

Redemptions During 1934, 1935 and 1936 Under Special Laws

Under Chapter 835—Statutes 1933 (4-Year Plan) .... None

Under Chapter 7—Statutes Special Session 1933-34 (10-Year Plan) $407.56

The witness further testified that prior to 1927 all of the district taxes were collected by the County Tax Collector but that since then the district has had its own tax assessor and collector, pursuant to amendments to the Palo Verde Irrigation District Act.

(Testimony of O. W. Malmgren.)

A schedule showing the lands deeded to the district in each of the years 1931 to 1937, inclusive, was introduced in evidence as

PETITIONER'S EXHIBIT NO. 28

reading:

Palo Verde Irrigation District
Comparative Statement of
Land Deeded to District
For Non-Payment of District Taxes
In Years 1931 to 1937, Inclusive

Year	Value on 1929 District Assessment Roll of Lands Deeded to District	Percentage Deeded	
1931	$918,835	23.25%	
1932	385,846	9.76%	Total assessed value
1933	....	....	of lands in District
1934	1,597,661	39.96%	on 1929 District
1935	1,054,893	26.69%	Assessment Roll
1936	....	....	$3,952,210
1937	....	....	
	$3,939,245	99.66%	

Note:

The above figures do not include land embraced within the boundaries of Blythe, Fertilla, Ripley and other subdivisions.

[197]

An additional amount of assessed values on the excepted subdivisions would bring the total to approximately four and one-half million dollars.

(Testimony of O. W. Malmgren.)

Over the objection of respondents on the grounds that the question assumes facts not in evidence and the testimony is incompetent and immaterial and calls for a conclusion, the petitioner introduced in evidence a schedule of unpaid and matured principal and interest as of September 1, 1937, as Exhibit 29. [198]

PETITIONER'S EXHIBIT NO. 29

is as follows:

PALO VERDE IRRIGATION DISTRICT
STATEMENT OF UNPAID AND MATURED PRINCIPAL AND INTEREST AS OF SEPTEMBER 1, 1937.

Bond Principal		
Palo Verde Irrigation District—First Issue	$	5,000.00
Palo Verde Irrigation District—Second Issue		11,000.00
Palo Verde Mutual Water Company		170,000.00
Palo Verde Joint Levee District—First Issue		264,000.00
Palo Verde Joint Levee District—Second Issue		71,000.00
Palo Verde Drainage District		297,500.00
Total		$818,500.00
Bond Interest		
Palo Verde Mutual Water Company	$	22,800.00
Palo Verde Irrigation District, 1st and 2d Issues		931,970.00
Palo Verde Joint Levee District, 1st and 2d Issues		469,999.21
Palo Verde Drainage District		343,507.00
Total		$1,768,276.21

(Testimony of O. W. Malmgren.)

Over said objection of respondents that the evidence was incompetent and immaterial and called for a conclusion of the witness, the witness testified that the aggregate amount of principal of the bonds now unpaid and past due was $818,500 and the aggregate amount of interest on the same bonds which is now matured and past due amounted to $1,768,276.21.

Over said objection of respondents that the evidence was incompetent and immaterial, assumes facts not in evidence, called for a conclusion of the witness, and was a hypothetical question not required under the evidence before the Court, the witness testified that the total amount of principal required to be levied would amount to $931,500 and the total amount of interest required would be $2,-024,317.51, if a tax levy was required to pay all the principal and interest past due and unpaid and to mature during the current year, and the aggregate of those amounts would [199] approximate $3,000,-000. The tax levy which would be necessary to pay these amounts upon the 1937 assessed valuation of the district would amount to $112.17 per hundred dollars of assessed valuation and after the payment of such assessment the amount of bonded indebtedness remaining unpaid would be $3,242,830.36.

Over like objection of respondents that it was incompetent and immaterial, called for a conclusion of the witness and assumed facts not in evidence, a schedule showing the foregoing figures was intro-

(Testimony of O. W. Malmgren.)

duced in evidence as petitioner's Exhibit 30, reading:

PALO VERDE IRRIGATION DISTRICT

TAX RATE FOR 1937-38 PROVIDED COURT REQUIRED TAX LEVY FOR ALL MATURITIES AND DELINQUENCIES UNPAID AT THAT TIME.

Principal Payments	
Palo Verde Mutual Water Company	$170,000.00
Palo Verde Irrigation District—First Issue	20,000.00
Palo Verde Irrigation District—Second Issue	22,000.00
Palo Verde Joint Levee District—First Issue	266,000.00
Palo Verde Joint Levee District—Second Issue	71,000.00
Palo Verde Drainage District	382,500.00
Total	$931,500.00

Interest Payments	
Palo Verde Mutual Water Company	$ 56,100.00
Palo Verde Irrigation District—First Issue	827,700.00
Palo Verde Irrigation District—Second Issue	101,760.00
Palo Verde Joint Levee District—First Issue	487,603.41
Palo Verde Joint Levee District—Second Issue	163,554.10
Palo Verde Drainage District	387,600.00
Total	$2,024,317.51

Principal Payments as shown above	$931,500.00
Interest Payments as shown above	2,024,137.51

Tax Rate of $112.17 per $100.00 computed on 1937 valuation.

Amount of Principal of present outstanding bond issues remaining unpaid after payment of above tax levy is $3,242,830.36. [200]

(Testimony of O. W. Malmgren.)

The schedule of tax rates necessary beginning with the year 1937 to pay the regular maturities of principal and interest upon bond issues and general administrative overhead expense of the district for the tax years 1937 to 1945 inclusive, disregarding present delinquencies and using the assessed valuation of the 1937 roll, was introduced in evidence over respondents' objections as

PETITIONER'S EXHIBIT NO. 31

reading:

PALO VERDE IRRIGATION DISTRICT

SCHEDULE OF TAX RATES NECESSARY TO PAY REGULAR MATURITIES OF PRINCIPAL AND INTEREST PLUS GENERAL ADMINISTRATIVE OVERHEAD EXPENSE FOR TAX YEARS 1937 TO 1945, INCLUSIVE, UNDER PRESENT BONDED DEBT, DISREGARDING PRESENT DELINQUENCIES AND USING ASSESSED VALUES FROM 1937 ASSESSMENT ROLL.

Year	Principal	Interest	Total Principal & Interest	Rate
1937	$133,500.00	212,586.48	346,086.48	14.04
1938	152,000.00	204,116.48	356,116.48	14.41
1939	160,500.00	194,536.48	355,036.48	14.37
1940	183,500.00	184,191.48	367,691.48	14.85
1941	200,500.00	172,466.48	372,966.48	15.05
1942	212,000.00	159,976.48	371,976.48	15.09
1943	169,000.00	151,116.48	320,116.48	13.06
1944	170,000.00	140,771.48	310,771.48	12.69
1945	170,000.00	130,366.48	300,366.48	12.31

Irrigation District 1937 - - Assessed Valuation $3,117,583.00

Less 15% for delinquencies................................ 467,637.00

Net Valuation $2,649,946.00

(Testimony of O. W. Malmgren.)

The witness further testified that the tax rate for 1937-1938 is $2 per hundred and the water toll rate $3.50 per hundred. In 1936-37 the tax rate was $1.75 per hundred with a water toll rate at $4 per hundred. The 1935-36 tax rate was $2.00 per hundred with the water toll rate at $4.50 per hundred. The 1934-35 tax [201] rate was $2.50 per hundred and the water toll $5.00 per hundred.

It was stipulated that in the spring of 1934 at approximately the time when the Reconstruction Finance Corporation adopted its resolution in March 1, 1934, the district board appointed two committees for the purpose of devising ways and means to get 99.66 per cent of the tax-deeded land back on the assessment roll of the district and county. The committee [202] appointed members of the Board upon that subject and that committee of three or four members of the Board, a larger committee of some eight or ten or twelve property owners of the City of Blythe and of the farming area outside of the City of Blythe. Those committees proceeded separately to survey the conditions existing and drew up approximately eleven or twelve plans. The ultimate plan was adopted by the district Board on the first of July, 1934, was approved, with certain amendments by the Board of Supervisors of Riverside County on July 16, 1934, and as amended was approved by the District Board on July 17, 1934. It was thereafter approved by the Board of Supervisors of Imperial County, by the State Comptroller

(Testimony of O. W. Malmgren.)
of California and by the Reconstruction Finance Corporation and is represented by a plan of which a printed copy was introduced in evidence as

PETITIONER'S EXHIBIT NO. 32

which was substantially as follows:

Notice was given that the Palo Verde Irrigation District offered to sell, lease, or option a tax title which might be deeded to the State of California and to the district, to the respective former owners of the lands or their assigns. A copy of the rehabilitation plan was included which stated that the district proposed to purchase from Riverside and Imperial Counties the State title to all lands which had been deeded to both State and district and the district proposed to pay the county for each parcel approximately one-half per cent of the assessed valuation of the land when last on the county assessment roll. The district would publish and mail an offer for a period of 60 days to sell, lease, or option to the former owner or his assigns the state and district tax title to such land at a price of 5 per cent of the 1929 district assessed value of the land and 3 per cent of the 1929 assessed value of improvements plus the cost to the district of acquiring the state title. Then follows terms, and conditions of sale and the following statement "Disposition of Proceeds." [203] "All proceeds of sale, lease or option of district lands now delinquent for taxes will first be credited to the reserve fund required by the Reconstruction Finance Corporation up to

(Testimony of O. W. Malmgren.)

the required amount of $60,220. Collections exceeding $12,044 per annum for the first five years may be applied in the discretion of the board on extensions and betterments on the Irrigation, Drainage and Levee systems, payments on the Reconstruction Finance Corporation loan, or otherwise as the board may determine." The plan further stated "a standby charge will be collected from all land in the district, except government land, to cover: (1) interest and principal on Reconstruction Finance Corporation loan; (2) general administration; (3) river control, levee operation, and maintenance."

A notice of the offer to all former owners of lands in the district was published and copies of the printed plan were mailed and delivered to all former owners appearing upon the tax roll. During the 60-day period permitted by the plan applications were received from former owners and their assigns and other qualified persons to purchase from the district, the district and state tax titles to approximately 49,000 acres of the 89,000 acres of land in the district. Agreements to sell these tax titles to the former owners were executed between the district and the applicants to approximately that acreage of the district. Those proceedings were carried on by the district during 1935.

On January 14, 1936, the district board by resolution offered a second opportunity to former owners to repurchase their land. A second rehabilitation plan was drafted and a notice published offering

(Testimony of O. W. Malmgren.)
to sell the land to the former owners about January 24, 1936, and the period of application was thirty days until February 24, 1936. In the second plan the price was raised from 5 per cent to 25 per cent of the 1929 assessed valuation. Only three applications were finally completed under this plan covering three pieces of land. A printed copy of the second plan, and a notice of offer was introduced [204] in evidence as petitioner's Exhibit 33. This exhibit was substantially the same as Exhibit 32 with the exceptions hereinbefore noted, and stated:

PETITIONER'S EXHIBIT NO. 33

"Disposition of Proceeds. The District Service Charge of $5.00 per acre shall be applied so far as necessary to the cost of procuring the State tax title and the cost of engineering service to be rendered by the District. All remaining collections may be applied, in the discretion of the Board, on extensions and betterments of the irrigation, drainage and levee systems, payments on the R.F.C. loan, or otherwise, as the Board may determine."

"Standby Charges. A standby charge will be collected upon all land in the District except Government land, to cover:

(1) Interest and principal on R.F.C. loan, (2) General administration, (3) River control, levee operation and maintenance."

There were thus left in the ownership of the district approximately 40,000 acres of the tax-deeded land which had not been disposed of under the first and second plan.

(Testimony of O. W. Malmgren.)

On October 16, 1936, the district by resolution offered these tax-deeded lands to the public irrespective of former ownership under a third plan, which was approved by the Board of Supervisors of Riverside County, the State Controller, and the Reconstruction Finance Corporation. Incidental to the plan, the district Board instructed its attorneys to file quiet title suits to those 40,000 acres. A copy of the third plan was introduced in evidence as petitioner's Exhibit 34 which provided for sale at public auction at a minimum price of ten per cent of the 1929 or last prior District assessed value of the land and improvements, and stated:

PETITIONER'S EXHIBIT NO. 34

Standby Charges. A standby charge will be collected by assessment from all land in the District, except government land, to cover: (1) interest and principal on R.F.C. loan; (2) general administration; (3) river control, levee operation and maintenance. Until the land is returned to the assessment roll, the standby charge will be based on last District assessed value, but will be collected under the contractual provisions of contracts executed [205] by the District."

(The stipulation was so far accepted subject to the objection that the evidence was incompetent and immaterial.) Up to this time the quieting of title has proceeded to the point where approximately 16,-

(Testimony of O. W. Malmgren.)
500 acres of lands have been quieted as to title. Four thousand five hundred acres of the land have been resold by the district to the purchasers under the third plan at an aggregate price of approximately $35,000 or a shade less than $8 per acre. Practically all of this 40,000 acres balance is unimproved brush land and probably 15,000 acres of it is waste land.

A statement bearing the title Palo Verde Valley Irrigation District fund statement, November 9, 1937, was introduced in evidence over objection of respondents that it was incompetent and immaterial as

PETITIONER'S EXHIBIT NO. 35.

This Exhibit is as follows:

County Treasurer	$40.81
Citizens National Trust & Savings Bank	
Water Toll	$16,263.62
Standby Account	19,267.70
Contingent Account	7,094.27
Repurchase Account	43,857.47
Tax Collector's Account	482.53
Reserve Account	12,044.00
	$99,009.59

Total Funds in Bank
(Checking Account $9,921.59)
(Time Deposit Account 89,088.00)

Cash on Hand	100.00
Total Funds, November 9th, 1937	$99,150.40

Then follows statement of collections during the years 1936 to 1938 making tthe total budget from October 16, 1936 to October 15, 1937, $145,742.04; then follows statement of expenditures.

(Testimony of O. W. Malmgren.)

The witness testified that the term "standby" is a designation popularly used for the annual district tax and that the term "Repurchase" designates moneys received from sale of land under the three rehabilitation plans. [206]

It was stipulated, subject to respondents' objection that it was immaterial and incompetent, that the items which this witness had testified to as the annual tax of 1934 to 1937 inclusive has been made to cover the following three items: Interest due to the Reconstruction Finance Corporation in accordance with the two contracts dated August 7, 1934, which are in evidence (Exhibits 19 and 20) being at the rate of 4 per cent on the amounts of money paid out by the Reconstruction Finance Corporation; general administration and overhead of the district; and river control, levee operation and maintenance. The tax levy resolutions and budget estimates adopted by the Board during the succeeding years of 1935, 1936, and 1937, were substantially similar. [207]

O. W. Malmgren proceeded to testify that the water toll was levied from 1934 to 1937 for the purpose of paying ordinary maintenance and operating charges and management expense of the district. None of the water toll money is applied to either interest or principal nor to the Reconstruction Finance Corporation. Moneys derived from the district tax and applied upon the Reconstruction Finance Corporation obligation are handled by

(Testimony of O. W. Malmgren.)
deposits in a local bank under the name of the Palo Verde Irrigation District, and when the items come due they are paid by district vouchers signed by the assistant secretary and manager pursuant to resolution of the Board.

Moneys paid upon any of the rehabilitation plans are deposited in the local bank and applied first to pay the expenses of the plans such as clearance of titles and surveys of the land. If there is any necessary construction cost to deliver water to such lands it is applied to that. Then in addition to that a certain reserve account is set up for the Reconstruction Finance Corporation obligation as set forth in the two contracts on file in this case. No portion of these funds are, or any time were, ever paid to the county treasurer for application upon the coupons of the bonds of these agencies or paid to any bondholders on such obligations. A portion of these funds have been paid to the Reconstruction Finance Corporation as interest.

There has been a small surplus so far after payment of expenses of the plans and this surplus has been deposited in the district's bank account in the repurchase fund in the general fund of the district. This fund is shown in Exhibit 27 as "$407.56 redemption." Funds received under the so-called ten-year plan are apportioned to the various accounts depending upon the tax years involved and covered by a regular tax collector's apportionment and then the funds remitted to the county treasurer. The $407

(Testimony of O. W. Malmgren.)

involves a ten-year period of collection and only a certain [208] part of that period has expired to date and practically everything of that fund which has been collected has been remitted to the Treasurer.

Tax sales, as the witness understands it, are automatically cancelled or void upon the issuance of a district tax deed. Upon sales of the tax-deeded land, assessments are made on the land and the purchaser undertakes obligations of paying the assessments. No assessments on personal property have been made within the district within the last several years.

With reference to the payment to the Reconstruction Finance Corporation including and since 1934, interest has been paid every six months by the district. The interest amounts to 4 per cent on roughly the amount of money that the Reconstruction Finance Corporation disbursed. The money is paid to the Los Angeles Branch of the Federal Reserve Bank of San Francisco and is paid by the district through the account of the district in the local bank. Receipts are sent for payments. When annual assessments have been made for the past four years no communication from the Reconstruction Finance Corporation relative to their demand or request or position as to the assessment that should be made for their obligation has been received by the district and the assessment is calculated and levied solely by the Board without written instruction

(Testimony of O. W. Malmgren.)
from the Reconstruction Finance Corporation or its agent, the Federal Reserve Bank. Other than those assessments made from 1934 to 1937, no assessments have been made by the Board since 1932-33 for bond interest or redemption.

It was stipulated that prior to the district's taking tax deeds to 99.68 per cent of the lands in the district there had existed upon certain lands in the district mortgages and trust deed liens.

Respondents read into evidence from the Official Minute [209] Book of the Palo Verde Irrigation District Board of Trustees, including the following from page 237:

"Whereas, California Districts Securities Commission, by its order and report designated 'Order No. 8—Approving Refunding Plan and Issuance of Refunding Bonds', dated May 4th, 1934, did approve the plan for issuance of refunding bonds set out in resolutions of this Board of Trustees, dated April 17th, 1934, and May 1st, 1934; and

"Whereas, in and by said order and report and, in particular, by paragraph numbered (3) thereof, it is provided as follows:

"(3) That said refunding bonds be issued to repay the Reconstruction Finance Corporation for equal amounts of loans provided by said Corporation for the payment of the said District's present outstanding indebtedness in accordance with Section 11 of the act entitled:"

(Testimony of O. W. Malmgren.)

From page 294 of the Minute Book, Minutes of Adjourned Meeting of Palo Verde Irrigation District, August 29, 1934, respondents read from a resolution adopted there by the Board as follows: "Whereas, among said changed conditions is the fact that party of the first part has been granted a certain loan in the amount of approximately $1,039,-000 by the Reconstruction Finance Corporation upon terms which might interfere with the carrying out of said lease dated August 18, 1932, and said Reconstruction Finance Corporation was expected in the near future to consummate said loan.

From page 325 of the minutes of a meeting of October 2, 1934, of the Board which is a resolution for the cancellation of the Florence Clark lease, the following was read in evidence: "Whereas, the Reconstruction Finance Corporation has heretofore authorized a loan to the Palo Verde Irrigation District in the amount of $1,039,423, to enable said district to reduce and [210] refinance its outstanding indebtedness, and the same advance from the Reconstruction Finance Corporation to Palo Verde Irrigation District is about to be made under said loan agreement," and then the resolution provides for the cancellation.

It was stipulated the respondents had present in Court an original bond of the Joint Levee District, being No. 176, for the principal amount of $1,000, due November 1, 1942; that Mr. J. R. Mason, one of the respondents, was present in court and would testify that it was his bond and that it was unpaid

(Testimony of O. W. Malmgren.)

and the bond was offered in evidence with the stipulation that it should be withdrawn or replaced by a photostatic copy of a bond in substantially the same form. (End of stipulation.)

A photostatic copy was received in evidence as

RESPONDENT'S EXHIBIT G,

which reads as follows:

United States of America
State of California

Number	Number
1237	1237
$1000	$1000

BOND OF PALO VERDE JOINT LEVEE DISTRICT OF RIVERSIDE AND IMPERIAL COUNTIES, CALIFORNIA

PALO VERDE JOINT LEVEE DISTRICT

of Riverside and Imperial Counties, California, situated in the Counties of Riverside and Imperial, State of California, for value received hereby acknowledges itself indebted and promises to pay the holder of this bond on the 1st day of May, 1957, at the office of the Treasurer of the County of Riverside, in the City of Riverside, State of California, the sum of One Thousand Dollars ($1,000) in gold coin of the United States with interest at the rate of six and one half per cent (6½%) per annum, payable semi-annually on the 1st day of November and the 1st day of May of each and every year from

(Testimony of O. W. Malmgren.)

and after the date hereof, at the office of the treasurer aforesaid on presentation and surrender of the interest coupons hereto attached, until this bond is fully paid. This bond is issued by the Board of Supervisors of said County of Riverside in conformity with the resolution of said Board dated the 24th day of April, 1918, and under the authority conferred upon the said Board by the provisions of the Act of the Legislature of the State of California, entitled "An Act authorizing levee districts of the [211] State to incur a bonded indebtedness for the purpose of building, constructing, or repairing levees of the district; or for excavating and constructing ditches or canals of such districts, or for the purpose of acquiring rights of way for any such levees, ditches, or canals; or for any and all of said purposes." Approved March 8th, 1911, and also by the provisions of the act of the Legislature of the State of California entitled "An Act to amend sections one, two, three, five, seven, eight, nine and ten of an act entitled 'An Act authorizing levee districts of the State to incur a bonded indebtedness for the purpose of building, constructing, or repairing levees of the district, or for excavating and constructing ditches or canals of such district; or for the purpose of acquiring rights of way for any such levees, ditches, or canals; or for any and all of said purposes,' approved, March 8th, 1911, and adding thereto four new sections designated as sections eight-a, eight-b, eight-c and eleven." Approved May

(Testimony of O. W. Malmgren.)

22nd, 1917. It is hereby declared that said Palo Verde Joint Levee District of Riverside and Imperial Counties, California, is a levee district duly created, organized, established, and Incorporated, in strict conformity to the laws of the State of California relating thereto. It is further declared that a majority of the qualified electors of said levee district voting at a special election held therein on the 30th day of January, 1918, which said election was held to determine whether bonds of said levee district in the amount of $1,285,951.86 should be issued and sold for the purpose of raising money for the purposes described in said acts, voted in favor thereof. It is hereby further declared that said election was duly called, duly held and duly conducted and the notices thereof duly given and the result thereof duly canvassed and declared in accordance with the provisions of the acts above mentioned and that all other proceedings of the Board of Trustees of such Palo Verde Joint Levee District of Riverside and Imperial Counties, California, and of the Board of Supervisors of Riverside County in the matter of the issuance of the bonds were regular and in strict accordance with the provisions of the said acts above mentioned and of the Constitution of the State of California; and that the total bonded indebtedness of said District authorized at such election does not exceed the entire estimate of the expense of the work planned and the cost of the maintenance of said work for one year after the

(Testimony of O. W. Malmgren.)

date of their completion. This bond is in the form prescribed by order of said Board of Supervisors, duly made and entered in its minutes on the 24th day of April, 1918, and in substantial conformity to the form prescribed by said acts and this bond shall be payable out of the bond fund of said Palo Verde Joint Levee District of Riverside and Imperial Counties, California, and the money for the redemption of said bond, and the payment of the interest thereon, shall be raised by taxation upon the taxable property of the district.

In Witness Whereof, the said Board of Supervisors has caused this bond to be signed by its chairman and by the Auditor of said County, with the seal of his office attached, this 1st day of May, 1918.

[Seal] T. F. FLAHERTY,
Chairman of the Board of Supervisors County of Riverside.

Attest:

CHAS. O. REID,
Auditor of Riverside County. [212]

Coupons attached to the foregoing exhibit read as follows:

$32.50 [Emblem] Coupon No. 34

On the First Day of May, 1935, The Treasurer of the County of Riverside, State of California,

(Testimony of O. W. Malmgren.)

will pay to the holder hereof, out of the Bond fund of the Palo Verde Joint Levee District of Riverside and Imperial Counties, California, at his office in the City of Riverside in said County, the sum of Thirty Two and 50/100 Dollars ($32.50) for interest on Bond of said District.

Dated May 1, 1918.

D. G. MITCHELL,
Treasurer of Riverside County.

$32.50

No. 1237 [213]

CHARLES R. STEBBINS

was called as a witness by petitioner and testified that he was County Tax Collector of Riverside County and had been such for twenty-five years. A statement headed "Riverside County Tax Delinquencies in the Palo Verde Irrigation District, Fiscal years 1929 to 1936, inclusive" was offered in evidence as petitioner's Exhibit 36, reading:

(Testimony of Charles R. Stebbins.)

RIVERSIDE COUNTY TAX DELINQUENCIES IN PALO VERDE IRRIGATION DISTRICT, FISCAL YEARS 1929 TO 1936, INCLUSIVE.

Fiscal Year	County tax Levied	Amount Paid to Delinquent Date of Second Instalment	Percentage Paid	Percentage Delinquent
1929	145,855.55	22,390.51	15.3%	84.7%
1930	147,216.43	53,006.19	36 %	64 %
1931	136,382.78	33,903.61	24.8%	75.2%
1932	124,536.91	15,941.82	12.8%	87.2%
1933	100,249.61	12,221.82	12 %	88 %
1934	103,422.97	15,588.64	15 %	85 %
1935	90,309.38	79,913.50	88.5%	11.5%
1936	68,866.99	61,508.10	89.3%	10.7%
Total	$916,840.62	294,474.19		

Note: This schedule has been prepared by deducting from figures compiled in this office relating to Palo Verde School District the amounts, being 4.5%, by which such figures exceed the actual figures relating to Palo Verde Irrigation District and, as so made up, is true and correct. Only nominal redemptions have been made since the delinquent dates above shown.

C. R. STIBBENS
County Tax Collector
Riverside County.

A statement of percentages of Palo Verde Irrigation District land deeded to the State of California for payment of County [214] taxes for the years 1930 to 1937, inclusive, was introduced in evidence as

PETITIONER'S EXHIBIT No. 37,

reading as follows:

(Testimony of Charles R. Stebbins.)

RIVERSIDE COUNTY COMPARATIVE STATEMENT OF LAND IN PALO VERDE IRRIGATION DISTRICT DEEDED TO STATE OF CALIFORNIA FOR NON-PAYMENT OF COUNTY TAXES, IN YEARS 1930 TO 1937, INCLUSIVE.

Year	Value on 1929 County Assessment Roll of Land Deeded to State	Percentage Deeded	
1930	$160,520	8 %	
1931	97,200	4.8%	
1932	92,370	4.6%	Total assessed value of lands in District on 1929 County Assessment Roll $1,995,210
1933	80,670	4 %	
1934	145,970	7.3%	
1935	154,130	7.7%	
1936	329,730	25 %	
1937	262,500	20 %	
Total	$1,323,090	81.4%	

W. D. WAGNER

was called as a witness for petitioner and testified that he resided in San Francisco and that he had been Deputy Auditor of San Bernardino County from 1890 to 1896 and County Auditor from 1896 to 1908, secretary to the California Railroad Commission from 1908 to 1912, director of Institutions of the State of California for four years, secretary and manager of the Merced Irrigation District from 1919 to 1922, and since 1921 has been secretary of the California Irrigation Districts Association com-

(Testimony of W. D. Wagner.)
posed of about 101 irrigation, reclamation, and county water districts. Since October 1933 until the present time he has also been appraiser for the Drainage, Levee, and Irrigation Division of the Reconstruction Finance Corporation; that he was generally familiar with all irrigation districts in California.

He has appraised irrigation districts for the Reconstruction Finance Corporation over California, Arizona, Nevada, [215] Oregon, Washington, and Idaho and made actual appraisals of approximately 75 and investigations of probably 30 to 40 additional districts. His appraisal reports have been submitted to the division for consideration in connection with application of those districts for loans. He first visited the Palo Verde Irrigation District ten or twelve years ago and has visited it eight or ten times altogether. He has developed a method of appraisal and analysis of the financial condition of the districts. He first appraised the economic conditions of the district and its financial affairs for the Reconstruction Finance Corporation in October or September of 1933. He went into the district, and examined the records, minute books, financial statements, crop records, ascertained the total number of acres, the total number of acres that are cultivated, and made an estimate of the number of acres which are irrigable; the adequacy and permanency of the water supply and the canal system and condition of the works are investigated as well

(Testimony of W. D. Wagner.)
as the drainage and levee system; studied canals, drainage situation and sufficiency of the levees. He interviewed many farmers as to what they have raised and their records of crop production. Thus he estimated the ability of the land to pay assessments, taking the record as to what the land had done and applying it to the average value of the crops. He went back a number of years on production and prices estimating what the farmers would have made with normal prices. He did not take as the ability of the land to pay what he had been able to pay the last few years, for if he had done so there would have been absolutely no loan value, because the farmers had not made sufficient money even to pay the ordinary operating expenses of the district, let alone anything for bond service. Appraisal was made on the basis of assumed normal prices for crops, and the witness stated that it was assumed in making the loan and the appraisal that prices would get better and farmers would be able [216] to sell their crops at a profit.

After arriving at the total number of acres that will be able to pay that is multiplied by the figure arrived at as the ability of the land to pay. Over the objection of the respondents, the witness testified that he had arrived at a figure of 40,000 acres that will be able to pay $7 a year for all taxes, assessments, maintenance, and operation, which would amount to $280,000. Out of this sum $180,000

(Testimony of W. D. Wagner.)

is necessary for maintenance and operation. From the balance of $100,000 must be deducted county and school taxes because those taxes must be paid. That leaves a balance of $60,000 a year which can be applied to principal and interest upon bonds. On a loan bearing 4 per cent interest amortized over a period of 30 years, this figures out to 5.78 per cent per annum, which will make a total over a period of 30 years of $1,038,042, which is the total amount this land can pay over a period of 30 years. The witness made a re-examination of the district in 1937. He again examined the district records, minutes and tax conditions, viewed the canals, drains and levees and crop conditions. If an appraisal has been made this year he doubts if he would have recommended as high a loan. On a 6% interest basis the present ability of the district to pay bonds would be $824,000. A thirty-year basis for amortization was adopted because the Reconstruction Finance Corporation has generally adopted a period of 33 years as the length of the loan with nothing but interest to be paid for the first three years. This is a reasonable period to adopt in refinancing an agricultural district such as this.

It was stated for the record that the City of Blythe was subject to tax for all obligations for the former Levee District and all obligations of the Irrigation district but not subject to tax for the bonds and interest of the former Drainage District nor for the maintenance and operation of drains.

(Testimony of W. D. Wagner.)

The witness stated that he gave minor consideration to Blythe because it is a very [217] small portion of the district.

The witness testified further that very minor consideration was given to the value or future value of the land in the district because it was his opinion that the value of the land has nothing to do with the ability of the land to pay. The entire income of the district is derived from the products of the soil. Consideration was given to the need for capital expenditure for improvements and betterments to the irrigation system and particularly to the drainage system. The drainage conditions were bad. They are today in far worse condition than in 1933. He took into consideration the delinquent county taxes, and it was his understanding and had great weight, that the County of Riverside had agreed to cancel something like $725,000 of county taxes for approximately $6,000 which he understood later amounted to something around $10,000. It was the conclusion of the witness that all of the outstanding bonds of the district would be refinanced and cancelled and that the total outstanding debt of the district would be the loan from the Reconstruction Finance Corporation. He stated that he knew of no other place in the financial world where the district could get a thirty-year loan at 4%.

(Testimony of W. D. Wagner.)

On

Cross Examination

the witness testified that at the other hearing of the matter in the Federal Court he testified that he only considered the value of the lands incidentally in an appraisal because the Reconstruction Finance Corporation is not in the business of taking over lands and in making his appraisal [218] he took the district as it existed in 1933 and estimated what the conditions were apt to be in the future. No man can tell the ability of the land to pay, but an assumption has to be made of prices of commodities. At the former hearing he also testified that it was not necessary to estimate the total value of the crops in the entire valley but he had to take an average over the whole district.

The witness as secretary of the Irrigation District Association of California made a report in 1928 at the request of some banks, bond houses and of bond brokers and at their cost, with a little profit to the Association. Most of the data in the report is from information furnished by the districts. The statement on page three is correct reading "pursuant to instructions given me at the last meeting of the association I have visited nearly all of the irrigation districts in the state, practically all of those functioning and some of those that are not." Respondents also read from page 22 of the report headed "Palo Verde Irrigation District organized

(Testimony of W. D. Wagner.)
under Palo Verde Irrigation District Act of October 27; it contains 88,697 acres of which 79,056 acres are *irrigatible* and 36,135 are irrigated. The population of the district is 7,000; assessed valuation of the district is $5,000,000 leaving out the odd figures; and the rate is $13.48. The estimated value of the district is $11,000,000."

Respondents introduced in evidence as their Exhibit H a letter dated June 18, 1934, headed "Reconstruction Finance Corporation" bearing the purported signature of Emil Schram, chief of the drainage, levee, and irrigation district, addressed to J. Rupert Mason, San Francisco. Said Exhibit H reads as follows:

RESPONDENT'S EXHIBIT H

Re: Docket No. Ref. 92

Dear Sir:

Your letter of June 14, has received careful consideration but you appear to have overlooked that part of the last paragraph of my letter of June 4th to Mr. James H. Jordan, of Riverside, [219] to which you refer, where I say "the activities of this Division are controlled by the provisions of Section 36 of the Emergency Farm Mortgage Act."

Regardless of the merits of the contention that the Palo Verde Irrigation District is entitled to reimbursement from the Federal Treasury for *post* expenditures for flood control, the Reconstruction

(Testimony of W. D. Wagner.)
Finance Corporation has no authority to make any such reimbursement. We are endeavoring to do our best to render the aid authorized by Congress and if additional action should be taken by Congress for the relief or further development of the above district that body is the one to approach and not the Reconstruction Finance Corporation.

You evidently also overlooked the fact that the Federal Land Banks in refunding mortgage indebtedness are not required to effect reductions in applicant's outstanding indebtedness, by Section 36, Part 4, of the Emergency Farm Mortgage Act of 1933, as amended, specifically requires that refunding loans from the Reconstruction Finance Corporation to agricultural improvement districts made under the power granted therein shall bring about a "substantial reduction" in the amount of outstanding indebtedness of applicant districts.

Please understand there is no disposition on the part of the corporation to force any bondholder to accept the settlement offered by any district under the terms of a refinancing loan authorized by it. In passing on applications we endeavor to determine the amount which land within applicant districts can pay in the way of taxes and assessments for operations, maintenance and service of the proposed loan and if our conclusions are correct, bondholders can not expect to receive through any other method of collection more than our loan contemplates when the prompt cash settlement and other advantages are taken into consideration.

(Testimony of W. D. Wagner.)

Mr. Wagner further testified that school bonds, county bonds, and city bonds of the City of Blythe were taken into consideration in arriving at the ability of the lands to pay. The record at that time showed the tax at approximately $2.08 per acre for county, school, and road tax, and since then the county has reduced the assessed valuation more than 50 per cent with the result today that the county and school taxes are about $1.02 or $1.03 an acre. He did not recall that there were any school bonds, county bonds, or city bonds outstanding at the time of the appraisal but if there were, they were taken into consideration. In considering such school bonds, city bonds, and county bonds he did not assume that they were going to be reduced by 50 or 75 per [220] cent. He wouldn't say that such bonds stood in any different relation than the irrigation bonds to the ultimate payer which is the landowner. He assumed that district operation and maintenance taxes and county taxes must be paid. The irrigation district bonds were selected as the ones that must be cut down or scaled down because he had under consideration an application from the Irrigation district for a loan from the Reconstruction Finance Corporation to reduce the irrigation district's bonded indebtedness. If in ten or fifteen years, 20,000 acres of productive land are added to the district that would make a difference in the district's ability to pay the bonds. But in the witness' judgment that was not possible. He had taken 40,000 acres as the maximum acreage to be cultivated in that district.

(Testimony of W. D. Wagner.)
He considered that an appraiser, taking as a basis normal prices for products, can fix a value for the bonds that will be fair 15 to 20 years from now. It was true that he had testified in the other proceeding in the Federal Court that, assuming the land is all clear the land in the district would be worth $70, $75, or $80, speaking of clear and improved land. The land in 1933 had no sale value whatever. The average cost of clearing brush, leveling the land for irrigation, ditching it, and putting it in a condition to be farmed would run anywhere from $20 to $50 an acre, possibly some of it higher.

A written stipulation of facts was introduced in evidence as

RESPONDENT'S EXHIBIT I.

This exhibit was as follows:

On March 29, 1935, the Palo Verde Irrigation District filed a petition in the U. S. District Court, for the Southern District of California, Central Division, being cause No. 25394-C therein, for readjustment of debts under the provisions of Sections 78, 79 and 80 of the Bankruptcy Act of 1898 of the United States. This petition set forth the organization of the Mutual Water Company on March 9, 1909; the execution of the deed of trust dated February 1, 1916, as security for payment of the coupon bonds in the [221] amount of $500,000 referred to in the petition herein, and that pursuant to the provisions of Sec. 11 of the Palo Verde Irri-

(Testimony of W. D. Wagner.)

gation District Act the Mutual Water Company transferred its irrigation system to the Palo Verde Irrigation District by deed dated December 1, 1925. The petition also set forth the organization of the Levee [222] District on June 17, 1914, and issuance of its bonds herein set forth, organization of the Drainage District referred to in these proceedings on August 16, 1921, and further set forth in its petition the merger thereof in the Palo Verde Irrigation District, and subsequent issue of bonds by the Palo Verde Irr. District. The petition also set forth that the district was unable to meet its debts as they matured and desired to effect a plan of readjustment under the Bankruptcy Act of 1898, and that it desired to effect a plan of readjustment of its debts, and alleged that the Reconstruction Finance Corporation owned and held more than 94% in amount of the securities referred to, which consisted of the same securities that are described in the petition in this cause, and set forth that said Reconstruction Finance Corporation on February 26, 1935, in writing accepted the said plan of readjustment; that the plan set forth in said petition provided substantially the same terms as to bondholders as the plan in the instant case, and said acceptance was executed by the Reconstruction Finance Corporation on said date, and stated that the said corporation accepted the plan of readjustment and consented to the filing of the petition in the U. S. District Court, and stated that said cor-

(Testimony of W. D. Wagner.)
poration owned approximately 95% of the outstanding indebtedness of said district, consisting of bonds of the Palo Verde Mutual Water Company, Palo Verde Joint Levee District of Riverside & Imperial Counties, California, first issue; Palo Verde Joint Levee District second issue, Palo Verde Drainage District, Palo Verde Irrigation District first and second issues. The plan referred to proposed delivery to each of the owners of the bonds refunding bonds in the principal amount equal to 24.81 per dollar of the principal amount of the various issues of bonds.

The petition further recited that a correct list of the non-creditors was attached, which included those who are respondents in this cause, together with a description of their claims, [223] which is still substantially the same; that said plan was proposed by the Board of Trustees of the District on January 22, 1935, and approved by the California Districts Securities Commission on March 27, 1935; that said petition further referred to the actions of respondents Jordan, Covell, Mason, First National Bank of Tustin and Abadie, which actions are still pending, and the district in its petition prayed that the plan be confirmed and that the several parties to the actions referred to be restrained from proceeding with their actions. All of these actions were actions upon the bonds and coupons of the several creditors against the district, and upon the filing of the petition the court made an order ap-

(Testimony of W. D. Wagner.)
proving it as properly filed and issued a restraining order restraining the creditors in said actions from proceeding with their actions to enforce payment of their bonds and coupons. An order to show cause was issued out of said court and upon return was made permanent. That the several creditors referred to, namely, Jordan, Covell, Mason, First National Bank of Tustin and Abadie, filed answers in said cause, and the same came on for trial and was heard before the court and tried upon the merits and subsequently submitted, and then under date of December 8, 1936, the Honorable George Cosgrave, U. S. District Judge, caused to be entered in the records of said United States District Court a judgment of dismissal dismissing the said cause on the grounds of the unconstitutionality of the so-called municipal bankruptcy act, being Sections 78-80 of the Bankruptcy Act of 1898. That during the pendency of said cause and until the dismissal thereof on December 8, 1936, the said causes, numbers 25560, 25561, 25579, 25587, 25588, 25594 and 26604, and all other actions of bondholders of the Palo Verde Irrigation District or those districts which had been merged with it, were restrained by order of the U. S. District Court, and during said period of time any action seeking to collect bonds or coupons of said district or to enforce [224] levy of assessments on behalf of bondholders was enjoined and restrained by the said U. S. District Court.

(Testimony of W. D. Wagner.)

That subsequently Palo Verde Irrigation District appealed from the said order of dismissal to the U. S. Circuit Court of Appeals, Ninth Circuit, which appeal was subsequently dismissed by the U. S. Circuit Court of Appeals.

Statement of Claims of Creditors.

The creditors who have appeared in this cause, namely, James H. Jordan, J. R. Mason, Geo. F. Covell, L. F. Abadie, C. F. Veysey and First National Bank of Tustin, California, if present in Court would testify that they are respectively the owners and holders of the bonds and coupons of the Palo Verde Irrigation District, Palo Verde Joint Levee District of Riverside and Imperial Counties, California, and Palo Verde Drainage District, as set forth by them in their several answers herein and that this statement may be considered as evidence. This stipulation as to the interests of said creditors is made subject to the requirement that said creditors produce said bonds and coupons before any exchange for the benefits offered by the plan may be effected.

There are pending at this time in the courts of this state actions by said creditors, as follows:

Action No. 2251, in the Justice's Court of Riverside Township, Riverside, Calif., entitled "James H. Jordan, Plaintiff, v. Palo Verde Irrigation District, et al., Defendants", being an action at law to recover a judgment in the amount of $720.00 on coupons alleged to be owned by the plaintiff.

(Testimony of W. D. Wagner.)

Action No. 25561, pending in the District Court of Appeal, Fourth Appellate District, entitled "James H. Jordan, Plaintiff, v. Palo Verde Irrigation District and Palo Verde Drainage District, Defendants", being numbered 1595 therein, on appeal from the Superior Court of Riverside County, wherein the [225] plaintiff secured a judgment against the Palo Verde Drainage District on March 12, 1935, in the sum of $720.00, with interest and costs, and which said cause has never been determined on appeal, and which said cause is also pending against the Palo Verde Irrigation District.

Action No. 25560, entitled "James H. Jordan, Plaintiff, v. Palo Verde Irrigation District and Palo Verde Joint Levee District of Imperial and Riverside Counties, California, Defendants", now pending on appeal in the Fourth Circuit Court of Appeals, and numbered therein 1594, having been appealed from the Superior Court of Riverside County, and wherein on March 12, 1935, the plaintiff secured a judgment in the sum of $11,380, with interest and costs, against the Palo Verde Joint Levee District of Riverside & Imperial Counties, California, and which cause has never been determined on appeal, and in which said cause judgment was obtained against the Palo Verde Irrigation District on March 17, 1937, for $11,380.00.

Action No. 28882, entitled "James H. Jordan, Plaintiff, v. Palo Verde Irrigation District and Palo Verde Drainage District, Defendants", pend-

(Testimony of W. D. Wagner.)
ing in the Superior Court of Riverside County, being an action to recover a judgment at law for $3420, costs and interest.

Action No. 28883, entitled "James H. Jordan, Plaintiff v. Palo Verde Irrigation District and Palo Verde Joint Levee District, Defendants", pending in the Superior Court of Riverside County, being an action at law to recover the sum of $8860, interest and costs.

Action No. 25588, entitled "First National Bank of Tustin, Plaintiff, v. Palo Verde Irrigation District and Palo Verde Drainage District, Defendants", now pending in the District Court of Appeal, Fourth District #1596, on appeal from the Superior Court of Riverside County, being an action to [226] recover judgment in the sum of $1440, interest and costs against the Palo Verde Drainage District, which appeal is undetermined and in said cause judgment was obtained against the Palo Verde Irrigation District on March 17, 1937, for $1440.00 and $9.25 costs.

Action No. 28881, entitled "First National Bank of Tustin, Plaintiff, v. Palo Verde Irrigation District and Palo Verde Drainage District, Defendants", now pending in the Superior Court of Riverside County, being an action at law to recover $7080, interest and costs.

Action No. 2204, pending in the Justice's Court, Riverside Township, Riverside, California, entitled "C. F. Veysey, Plaintiff, v. Palo Verde Irrigation

(Testimony of W. D. Wagner.)
District, Defendant'', being an action at law on coupons of the Palo Verde Irrigation District, in the amount of $660.00.

That in all of the foregoing actions pending in the superior court, further procedure by the court has beeen stayed by an order based upon Section 5 of the Irrigation District Refinancing Act, issued by virtue of the pendency of the proceedings in this cause.

The following actions are also pending:

Action No. 25594, entitled ''L. F. Abadie, Plaintiff, v. Palo Verde Irrigation District, Defendant'', pending in the Superior Court of Riverside County, being an action at law to recover $3600.00 on unpaid coupons of the Palo Verde Irrigation District, wherein the default of the defendant for failure to answer was entered, and subsequently on August 24, 1937, the default was set aside by order of this court because of the pendency of these proceedings.

Action No. 25579, entitled ''George F. Covell, Plaintiff, v. Palo Verde Irrigation District and the County of Riverside and the County of Imperial, Defendants'', being an action at law to [227] recover $2700, with interest and costs, upon coupons of bonds owned by the plaintiff, wherein the plaintiff requested the entry of default by the clerk for failure of the defendant Palo Verde Irrigation District to answer, and wherein the clerk has refused to enter default by virtue of the pendency of these proceedings.

(Testimony of W. D. Wagner.)

Action No. 25589, entitled "J. R. Mason, Plaintiff, v. Palo Verde Irrigation District and Palo Verde Joint Levee District of Riverside and Imperial Counties, California, Defendants", being an action at law pending in the Superior Court of Riverside County against said defendants for the recovery of judgment in the sum of $8427.50, with interest and costs, upon bonds and coupons of the plaintiff of said districts, wherein the plaintiff requested the clerk to enter default of the defendant Palo Verde Irrigation District for failure to answer, but the clerk refused to enter default because of the pendency of these proceedings.

Action No. 29895, entitled "J. R. Mason, Plaintiff, v. Palo Verde Irrigation District, Palo Verde Joint Levee District of Riverside and Imperial Counties, and County of Riverside, Defendants", pending in the Superior Court of Riverside County, being an action at law to recover $2437.50, costs and interest upon a bond of the Levee District and coupons detached from Levee District bonds, which said cause is still pending.

There is also pending in the Superior Court of Riverside County an action, being action No. 28684, entitled "James H. Jordan, J. R. Mason, First National Bank of Tustin, California, a corporation, L. F. Abadie, and C. F. Veysey, Petitioners, v. Palo Verde Irrigation District, a public corporation, Board of Trustees of the Palo Verde Irrigation District, a public corporation, L. A. Hauser as Pres-

(Testimony of W. D. Wagner.)
ident of the Palo Verde Irrigation District, a public corporation, R. A. Grant as Vice-President of Palo Verde Irrigation District, a public corporation, Wayne Fisher [228] as Secretary of the Palo Verde Irrigation District, a public corporation, O. W. Malmgren as Assistant Secretary of the Palo Verde Irrigation District, a public corporation, O. W. Malmgren as Collector of Palo Verde Irrigation District, a public corporation, J. F. Reimer as Treasurer of Palo Verde Irrigation District, a public corporation, Citizens National Trust & Savings Bank (Blythe Branch) a corporation, A. Doe, B. Doe, C. Doe and D. Doe Company, Respondents", wherein petitioners filed a petition for writ of mandate and secured an alternative writ of mandate on December 29, 1936, reading in form, except for title of court and cause, as set forth, as follows:

The People of the State of California Send Greeting to the Palo Verde Irrigation District, a public corporation; Board of Trustees of the Palo Verde Irrigation District, a public corporation; L. A. Hauser, as President of the Board of Trustees of the Palo Verde Irrigation District, a public corporation; R. A. Grant, as vice-president of the Palo Verde Irrigation District, a public corporation; Wayne Fisher, as secretary of the Palo Verde Irrigation District, a public corporation; O. W. Malmgren, as assistant secretary of the Palo Verde Irrigation District, a public corporation; O. W. Malmgren, as collector of the Palo Verde Irrigation District, a public corporation; J. F. Reimer, as

(Testimony of W. D. Wagner.)

treasurer of the Palo Verde Irrigation District, a public corporation; Citizens National Trust & Savings Bank, Blythe Branch, a corporation; A. Doe, B. Doe, C. Doe and D. Doe Company, Defendants and Respondents.

Whereas, it appears to me by the verified petition of James H. Jordan, J. Rupert Mason, First National Bank of Tustin, California, a corporation, L. F. Abadie and C. F. Veysey, the parties beneficially interested herein, that you, the said defendants and respondents above named, refuse to pay to the petitioners, the following amounts due them, respectively, upon their matured bonds and matured interest coupons, of defendant irrigation district or assumed by it, viz.:

To James H. Jordan	
on matured bonds	$16,000.00
on matured interest coupons	7,295.00
To J. Rupert Mason	
on matured bonds	3,000.00
on matured interest coupons	9,782.00
To First National Bank of Tustin, California	
on matured bonds	0.00
on matured interest coupons	2,340.00
To L. F. Abadie	
on matured bonds	0.00
on matured interest coupons	5,850.00
To C. F. Veysey	
on matured bonds	0.00
on matured interest coupons	660.00

[229]

(Testimony of W. D. Wagner.)

It appearing from said petition that said petitioners are entitled to have said bonds and interest coupons paid out of funds available to pay the same, particularly from the proceeds of the levy of the assessment hereinafter referred to, with penalties; and it appearing that all of said bonds and interest coupons were duly presented for payment; that said Palo Verde Irrigation District has heretofore levied an assessment for so-called "Standby Charges" to raise money to pay interest on a loan made to said district by the Reconstruction Finance Corporation, assessment due December 7, 1936, and has collected a part thereof; that you, and each of you, refuse to apply the said proceeds of said levy towards the payment of said bonds and interest coupons; and that said proceeds should be so applied.

We Do Hereby Command You that you use and apply all moneys on hand available to petitioners, together with the proceeds, including penalties, of said assessments, to pay said matured bonds and matured interest coupons, in order of maturity thereof, before any interest is paid to said Reconstruction Finance Corporation, or is paid on any other bonds or interest coupons, or

You and Each of You Will Show Cause before this court at the Court Room of Department 2 thereof, in the Court House at Riverside, California, on the 7th day of January, 1937, at 10 A.M. of that day, why you have not done so.

(Testimony of W. D. Wagner.)

Witness, the Honorable G. R. Freeman, Judge of said Court.

Attest my hand and the seal of said court, this 29th day of December, 1936.

D. G. CLAYTON,
Clerk.

J. C. ROBERTS,
Deputy Clerk.

That said action is still pending and the said alternative writ is still outstanding and in full force and effect. That there is pending in said cause a demurrer to the first amended petition, which has not been disposed of by the court for the reason that further proceedings in said cause have been stayed by order of the court on August 21, 1937, wherein a minute order was entered denying the motion to proceed to hear the demurrer to the amended petition on the grounds that the proceedings are stayed by the proceedings in this cause, number 19247. (End of stipulation.)

CARROLL B. REYNOLDS

was called as a witness for the petitioner and testified that he had resided in the Palo Verde Valley since January of 1909 and had been in the real estate and insurance business since 1910 and [230] engaged in the farming and ownership of lands in the valley from 1911 to the present time. He had

(Testimony of Carroll B. Reynolds.)
handled numerous sales of real estate, loans upon real estate, and insurance upon real estate improvements, and had acted as representative of certain loaning agencies, the California Bank of Los Angeles and the State Mutual Building and Loan Asscoiation of Los Angeles in the valley. The California Bank started making loans in 1913 and discontinued in 1920. The State Mutual started to make loans on homes and buildings in Blythe about 1919 and made them for just a few years. Those agencies ceased to make loans because the loans got fewer and the people couldn't pay their obligations, beginning about 1920 and getting worse after the flood of 1922. There were six or seven hundred people in the valley in 1910, and the railroad came in 1916, and the big influx of people occurred between 1916 and 1920. The 1920 census showed 1600 people in Blythe; 1930 census 1000. Lots of people left the valley and never returned when the flood of 1922 occurred. We had one or two good years, but the process of people leaving the land was continuous from 1920 on. There was a good year in 1923 when cotton went to 35 cents, and the big year of the valley was in 1919 when cotton went to 50 cents a pound and people came in and paid as high as $400 an acre for land down there. Next year cotton dropped to 12 cents and they all went broke. Land value has decreased steadily after 1919. In 1932, 1933, 1934, some of the choice agricultural land in the valley could be bought for $10 an acre and from

(Testimony of Carroll B. Reynolds.)
there down to $1 an acre. There weren't any sales made until this new plan was outlined and we thought we had the loan and then that was in the fall of 1934 and then there were a great many sales made around a $1 an acre of good land. Very little land has been cleared and leveled in the valley for less than $50 an acre and the average is closer, where it is well leveled, to $100 an acre. Some lands sold for less than a dollar an acre. Eighty acre tracts were sold for $50 and forty acres for $25. I bought and sold some myself. Average temperature [231] in the summer is around 100 to 110; maximum 125. It is too cold in winter for citrus fruit. The district could not have sold the land for a higher price than that fixed in the first rehabilitation plan. Over the objections of respondents the witness testified that in his opinion the land could not pay more than $7 an acre over an extended period of years for district tax, county tax, and water toll. The valley land is not well leveled and more investment is needed to put the land in good condition and put out its maximum crops. The farmers have not made any return on their investment in their land for 15 to 20 years.

F. B. MANUSH

was called as a witness by petitioner and testified that he is in the business of cotton ginning and buying of cotton, and a member of a partnership engaged in such business which has cotton gins at

(Testimony of F. B. Manush.)
Blythe and Ripley in the Palo Verde Valley. He identified exhibits numbers 11, 12, and 13 as having come from his sample room. Exhibit 11 is much below the average quality of cotton produced in the past years in the Palo Verde Valley. Up to a couple of years ago 75 per cent of the valley's cotton was of middling and good middling quality. The leaf perforator and says bug have been present in the valley in the current season. They have reduced the quantity of cotton raised 30 to 35% and made it very low quality. They have gotton worse. For the last few years his firm has been financing about 7,000 acres of cotton in the valley secured by crop and chattel mortgages. They usually advance to the irrigation district its charges on the land as such become due. His firm has been advancing about $16 to $18 per acre of the expenses of raising the cotton crops in which his firm is interested. He expects that they cannot finance very much, due to pests and low prices, and if they do it will be on a very conservative basis. He would say that the quantity of cotton produced per acre has decreased about 30 to 40 per cent since 1921. One reason is the land runs [232] down and the farmer hasn't got enough money to rotate the crop. He has had to borrow money all the time to make his crop and can never get ahead and therefore has had to take poor land. The land usually produces more where it is farmed by the landowner. The samples of cotton were introduced in evidence by petitioner as their Exhibits 11, 12 and 13 over the objection of respondents.

LLOYD NORVILLE

was called as a witness by petitioner and testified that he had resided and farmed in the Palo Verde Valley for about twenty years; that he had farmed cotton, alfalfa, grain, milo, and wheat. Last year he farmed 120 acres, about 40 alfalfa, 40 cotton, and 40 of grain, wheat, and milo. He is a director of the Palo Verde Irrigation District and has been such a little over a year and had been a director a year once before. During the flood of 1922 the water covered the valley south from a mile or two below Blythe. The water stood on the land for about two months and at the town of Ripley there was 5 feet of water. The standing on the soil did not seem to hurt the soil much but the current washed the district canals and the pipe and ditches; washed great holes where you could pretty near bury this court house. People began drifting away from the valley and at least half of them never came back. Later they gradually drifted out because of high taxes.

The leaf perforator has been in the valley for several years but didn't amount to much until 1936 when it has taken an entire field and this year it spread over the entire valley. He does not expect cotton to continue as a major crop unless they get rid of the insects.

This year there was a bug which damaged the first and second cuttings of alfalfa. Six cuttings on old hay and five on new hay are secured from alfalfa in the valley. The alfalfa seed raised in the valley

(Testimony of Lloyd Norville.)
is marketable. When alfalfa is raised for seed there is always one cutting of hay and some people will [233] take off two cuttings. The seed crop was practically a failure this year. As to what the land can pay over an average 10 year period, the present taxes and assessments are about $7.50 an acre and they are all they have been able to pay on the best land. That includes water tolls, stand-by charge, and state and county taxes, and $1 repurchasing. Five dollars and fifty cents an acre is about the maximum the average acre can pay. In 1926 and 1927 he was paying practically $20 an acre on $100 assessed valuation for water taxes and so forth and the amount had kept creeping up. He bought the place where he lives in 1926 and started paying taxes on it, and he naturally figures the next ten years will be just like the last ten years. From 1926 to 1930 the farmers did not make enough to pay the taxes and borrowed from the financing companies and the banks to pay them. By 1930 the average farmer had no credit left to borrow on. He thinks the greater half of the land in the district is encumbered by a mortgage or a trust deed. There were very few foreclosures in the district. In general the banks and insurance companies did not eject the farmers from the land which they had taken over, and in many cases they had scaled debts down. The farmers have been allowed to retain possession without even paying rent for several years since the default, and in a good many instances the banks have advanced taxes and water tolls.

TONY SEELEY

was called as a witness by petitioner and testified that he came to the vicinity of the Palo Verde Valley in 1900 and moved into the Palo Verde Valley in 1915 and since that time has been ranching and has been raising alfalfa, cattle, cotton, and grains upon what he considered some of the best land in the valley. He is also renting some poor land. He is farming 240 acres now. He was a member of the Levee Board of Directors from 1918 to 1925 and a member of the Irrigation District Board from 1925 to a year [234] ago last September. He is familiar with the drainage system and it is in bad condition now and a capital investment is necessary on the drainage ditches to protect the lands in the valley from becoming water-logged. Ten or fifteen miles in new drains should be built which would cost at least $1,000 a mile. Over objection of respondent he testified that the average acre in the district could not pay over five or six dollars an acre per year over a future period of ten or twenty years. From 1927 to 1930 most of the farmers were borrowing money to pay district taxes. Thereafter they had no credit. In arriving at a figure of $5 or $6 which the farmers could pay his taxes per year the witness meant that they could pay these after their operating costs were paid, namely, planting and harvesting their crops, living expenses, purchase price, financing to grow their crops, interest and principal on loans, but he did not take into account the farmers making any return by way of interest on their in-

(Testimony of Tony Seeley.)

vestment in the land. They have made no return on their investment the last few years. If county taxes, district taxes and water toll were set for the coming year at $12 to $15 per acre, there would be no farming at all. The farmers would abandon their places wholesale and try to get them a job. The taxes are a rather small item of the cost of farming. Costs of farming are generally higher in Palo Verde Valley than in other communities for raising the same crops.

It was stipulated that respondents would testify that *that* the bonds and coupons which they offer to prove here are past due and that they had presented substantial portions of past due bonds and coupons to the County Treasurer of Riverside County for [235] payment at various times from 1930 up to the present time and that they had not been paid for want of funds. It was further stipulated that the school bonds of the school districts within the Palo Verde Irrigation District are not now in default; that all of the past due bonds and coupons of the school districts are paid up to date; for two years 1931 and 1932 the County of Riverside paid the accrued maturities of principal and interest on the school bonds out of reserve county funds and that thereafter for a period of two or three years the school bonds were in default. In 1934 and 1935 the funds which the county had advanced for payment of these school bonds and interest were repaid out of taxes collected from the property in the school

(Testimony of Tony Seeley.)
districts. That two judgments rendered in this Court, the first, James H. Jordan vs. Palo Verde Irrigation District, in cause number 25561 judgment rendered April 7, 1937, and second, a judgment in cause 25588, First National Bank of Tustin vs. Palo Verde Irrigation District, rendered the same date, were offered for identification as respondents' Exhibits J and K, the court sustaining the objection of petitioner to their introduction in evidence on the ground that said judgments are not final, but are pending on appeal. Exhibit J reads as follows:

RESPONDENT'S EXHIBIT J

In the Superior Court of the State of California
In and For the County of Riverside

No. 25561

JAMES H. JORDAN,

Plaintiff,

vs.

PALO VERDE IRRIGATION DISTRICT, an irrigation district and PALO VERDE DRAINAGE DISTRICT, a public corporation,

Defendants.

JUDGMENT [236]

This cause came on regularly to be heard in open court on the 11th day of March, 1935, A. Heber Winder, Esq., appearing for plaintiff and Stewart, Shaw & Murphey, by Arvin B. Shaw, Jr., Esq.,

(Testimony of Tony Seeley.)

appearing for defendant, Palo Verde Irrigation District, an Irrigation District, and it being shown to the satisfaction of the Court, by proofs duly made.

That defendant, Palo Verde Drainage District, a public corporation, has been duly and regularly served with summons, together with a copy of the amended complaint, herein and has made default in that behalf, and its default for not appearing and answering unto plaintiff's amended complaint has been duly and regularly entered herein;

That defendant, Palo Verde Irrigation District, an Irrigation District, has appeared and filed its answer to said amended complaint, but the trial of the issues wherein raised cannot this day be held;

And said plaintiff having this day moved the Court to render judgment in favor of plaintiff and against defendants, Palo Verde Drainage District, a public corporation leaving this action to proceed as against said Palo Verde Irrigation District, an Irrigation District, defendant;

And the Court thereupon having heard the evidence produced herein and the arguments of counsel and being fully advised in the premises;

It Is Ordered, Adjudged and Decreed that said motion be and the same is hereby granted.

It Is Further Ordered that this action shall be left to proceed as against said Palo Verde Irrigation District, an Irrigation District, defendant.

(Testimony of Tony Seeley.)

It Is Further Ordered that James H. Jordan, plaintiff have and recover from Palo Verde Drainage District, a public corporation, [237] defendant, the sum of Seven Hundred Twenty and no/100 ($720.00) Dollars, lawful money of the United States, with interest thereon at the rate of seven per centum per annum from date hereof until paid, together with plaintiff's costs incurred in this action in the sum of $9.25.

Done in open court this 12th day of March, 1935.

O. K. MORTON,

Judge

[Endorsed]: Filed Mar. 12, 1935. D. G. Clayton, Clerk; By W. G. Waite, Deputy.

Recorded in Book 41 of Judgments at page 304 the 12th day of March, 1935. D. G. Clayton, Clerk; By Erma E. Dewey, Deputy.

(Testimony of Tony Seeley.)

RESPONDENT'S EXHIBIT K

reads as follows:

In the Superior Court of the State of California
In and For the County of Riverside.

No. 25588

FIRST NATIONAL BANK OF TUSTIN, California, a corporation,

Plaintiff,

vs.

PALO VERDE IRRIGATION DISTRICT, an irrigation district and PALO VERDE DRAINAGE DISTRICT, a public corporation,

Defendants.

JUDGMENT

This cause came on regularly to be heard in open court on the 11th day of March, 1935, A. Heber Winder, Esq., appearing for plaintiff and Stewart, Shaw & Murphey, by Arvin B. Shaw, Jr., Esq., appearing for defendant, Palo Verde Irrigation District, an irrigation District, and it being shown to the satisfaction of the Court, by proofs duly made,

That defendant, Palo Verde Drainage District, a public corporation, has been duly and regularly served with summons, to- [238] gether with a copy of the amended complaint, herein and has made default in that behalf, and its default for not ap-

(Testimony of Tony Seeley.)

pearing and answering unto plaintiff's amended complaint has been duly and regularly entered herein;

That defendant, Palo Verde Irrigation District, an irrigation District, has appeared and filed its answer to said amended complaint, but the trial of the issues therein raised cannot this day be held;

And said plaintiff having this day moved the Court to render judgment in favor of plaintiff and against defendant, Palo Verde Drainage District, a public corporation leaving this action to proceed as against said Palo Verde Irrigation District, an Irrigation District, defendant;

And the Court thereupon having heard the evidence produced herein and the arguments of counsel and being fully advised in the premises;

It Is Ordered, Adjudged and Decreed that said motion be and the same is hereby granted.

It Is Further Ordered that this action shall be left to proceed as against said Palo Verde Irrigation District, an Irrigation District, defendant.

It Is Further Ordered that the First National Bank of Tustin, California, a corporation, plaintiff, have and recover from Palo Verde Drainage District, a public corporation, defendant, the sum of One Thousand Four Hundred Forty and no/100 ($1440.00) Dollars, lawful money of the United States, with interest thereon at the rate of seven per centum per annum from date hereof until paid,

(Testimony of Tony Seeley.)

together with plaintiff's costs incurred in this action in the sum of $9.25.

Done in open court this 12th day of March, 1935.

O. K. MORTON,

Judge [239]

[Endorsed]: Filed Mar. 12, 1935.

D. G. Clayton, Clerk; By W. G. Waite, Deputy.

Recorded in Book 41 of Judgments at page 302 the 12th day of March, 1935.

D. G. Clayton, Clerk; By Erma E. Dewey, Deputy.

Over objections of respondents, the witness Seeley testified that he thought private indebtedness on mortgages and trust deeds to banks, insurance companies and others had been reduced more than 75 per cent by voluntary reduction. He stated that cotton acreage will decline and that for the acreage which goes out of cotton the farmers will have to plant some soil building crop such as alfalfa or clover. It would cost $25 or $30 an acre on the average to change cotton land over into alfalfa land.

J. W. CASEY

was called as a witness by the petitioner and testified he had [240] been farming in the Palo Verde Valley since October of 1919, farming principally cotton

(Testimony of J. W. Casey.)
and alfalfa and at the present time had 600 acres under his control. He was familiar with the productivity of the land and familiar with prices that had been paid from year to year during the last 18 years. Over the objection of respondents, he testified that it was his opinion that the maximum charge the average acre in the valley could pay over an extended period of years, assuming average production and average prices, for county taxes, district taxes, and water toll was about $6 an acre. If the taxes and toll were raised to $10 the farmers would go somewhere else. The outlook for cotton raising in the valley is pretty poor. The cotton acreage will decline. If cotton land were turned to alfalfa raising, the average land down there would cost $15 to $20 an acre for preparation and leveling of the land. No net income is ordinarily figured on the first year of alfalfa. An alfalfa stand in the Palo Verde Valley lasts some three to five years.

H. A. WALSH

was called as a witness for the petitioner and testified that he went to the Palo Verde Valley in October of 1908; that he has been farming ever since, principally cotton and alfalfa. He is a director of the Palo Verde Mutual Water Company. It is in liquidation. He was a director of the Palo Verde Irrigation District from 1927 to 1930-31. The

(Testimony of H. A. Walsh.)

farmers who came in the early years are the backbone of the situation now in the valley. Over the objection of respondents the witness testified that $5.50 to $6.50 per acre is the maximum amount that the average acre in the valley can pay for county tax, district tax, and water toll over an extended period of years assuming average prices and average production such as he had been familiar with, and that if the district tax should be increased to $10 or $12 an acre there would not be sufficient revenue paid in to operate the system. The system would have to be abandoned for lack of revenue. He is farming 90 acres now and a good part of that lies within the City of Blythe. The maximum tax rate on that land during [241] the years in which the rates ran highest from 1927 to 1930 was from $28 to $30 per acre on $100 assessed valuation. The city is quite heavily bonded. Roughly 25 per cent of the valley acreage has too much alkali to raise crops. Probably a thousand acres of the valley has too thin a soil to raise crops. There is river sand under 4 to 6 inches of silt and leaf mold. He is still staying with the valley. No place to go. These people have stayed in the valley because they had quite a bunch of guts and some hope.

R. A. GRANT

was called as a witness for the petitioner and testified that he is a trustee of the Palo Verde Irrigation District and has been such for a little over a year and he is now president of the district Board. He went into the valley in 1927 and has been farming continuously since. He is also an electrical contractor with his place of business in Blythe. He has planted 160 acres of pecans in the valley and there are about 10 acres elsewhere in the valley. His oldest trees were planted in 1927. So far he *has very* much in the red on the trees. They start bearing when they are about seven or eight years old and should be profitable now. It is all an experiment yet. The value of the crop this year will probably amount to $1,000. A reserve fund of some $25,000 to $50,000 should be kept on hand by the district to meet its expenditures during the dry period from the end of the water toll collection to the beginning of the collection of district taxes. The people wouldn't stand for abandoning the district and valley and having it over with. That is something that is peculiarly characteristic of the pioneer. He has wired many new houses in the City of Blythe lately as an electrical contractor. The public utility that serves the community has put in quite extensive improvements lately by way of rural lines. There are about 1000 people in Blythe and 2000 in the valley outside of Blythe. There has been considerable more building in the last year than there has

(Testimony of R. A. Grant.)

been in the last five [242] years. He understands that the Southern Sierras Power Company or the California-Nevada Corporation has made a total capital expenditure of $77,000 starting in November and ended in February. From 1932 or 1933 until 1936 there was no bank at Blythe. There is a branch of the Citizens-National Bank of Riverside there now. The recent building has been chiefly gasoline stations, auto camps, and residences. (End of Exhibit 1 and of transcript in Superior case.)

Over the objection of respondents petitioner introduced in evidence a certified copy of the resolution of the Reconstruction Finance Corporation under its seal, dated May 5, 1938, as petitioner's Exhibit No. 2. This Exhibit was the acceptance by the Reconstruction Finance Corporation of the plan of composition proposed in the present proceeding.

A certified copy of the resolution adopted by the Board of Trustees of the Palo Verde Irrigation District authorizing the commencement of the action by reference was admitted in evidence, it being Exhibit E attached to the petition. The respondents introduced in evidence over objection by petitioner as respondents' Exhibit A acceptance of the plan of readjustment of indebtedness of the Palo Verde Irrigation District, Bankrupt, by the Reconstruction Finance Corporation on April 7, 1937. [243]

Respondents introduced in evidence over objection by petitioner as respondents' Exhibit B the petition

(Testimony of R. A. Grant.)
in the State Court proceeding by the Palo Verde Irrigation District. This Exhibit is as follows: [244]

RESPONDENTS' EXHIBIT B

In the Superior Court of the State of California, in and for the County of Riverside.

No. 21947

In the Matter of Petition of

PALO VERDE IRRIGATION DISTRICT, an Irrigation District, for Readjustment of Debts.

PETITION FOR READJUSTMENT OF DEBTS

The Board of Trustees of Palo Verde Irrigation District, an irrigation district (which district is hereinafter designated "Petitioner") files the petition of said District for readjustment of debts and alleges:

I.

That Petitioner is an irrigation district duly organized on October 27, 1923, and now existing under and by virtue of the provisions of that certain Act of the Legislature of the State of California known as the "Palo Verde Irrigation District Act", (Stats. Cal. 1923, p. 1067) approved June 21, 1923, as amended.

(Paragraphs II to VI, inclusive, alleged the organization, history, and bond issues of petitioner, Palo Verde Mutual Water Company and Palo Verde Joint Levee District, substantially the same as in the petition in the present proceeding.)

(Testimony of R. A. Grant.)

VII.

That on or about November 1, 1922, said Levee District authorized, pursuant to the provisions of said Act, approved March 8, 1911, an issue of coupon bonds of said district, designated "Second Issue", dated November 1, 1922, in the aggregate principal amount of $371,378.50, payable serially on November 1 of each year from 1923 to 1962, inclusive, with interest at the rate of 6½% per annum payable May 1 and November 1 of each year. That said Levee District thereafter sold and issued all of said bonds. That there now remain unpaid bonds of said Second Issue in the principal amount of $304,378.50, together with substantially all interest coupons thereon maturing May 1, 1930, and thereafter.

VIII.

That by virtue of the provisions of Section 12 of said [245] Palo Verde Irrigation District Act said Levee District was, upon the organization of Petitioner, merged in and superseded by Petitioner and ceased to exist except in so far as may be necessary to preserve the rights of bondholders and other creditors, and Petitioner assumed all of the outstanding indebtedness of said Levee District, including the principal and interest on said bonds of said First and Second Issues.

(Paragraphs IX to XIII, inclusive, alleged further history of petitioner and of Palo Verde Drainage District.)

(Testimony of R. A. Grant.)

XIV.

That Petitioner is unable to meet its obligations above mentioned as they mature and that it desires to effect a plan of readjustment of said obligations under the provisions of that certain act of the Legislature of the State of California known as the "Irrigation District Refinancing Act" (Stats. Cal. 1937, Ch. 24) and desires to avail itself of the relief and remedies provided for by said act.

XV.

That on the 13th day of April, 1937, the Board of Trustees of said Petitioner adopted a resolution wherein and whereby said Board adopted a plan of readjustment of indebtedness. That said plan is fully set out in said resolution. That a certified copy of said resolution, including said plan, is filed and submitted with and accompanies this petition, to-wit, is attached to this petition, marked "Exhibit A" and by this reference made a part hereof.

XVI.

That the unpaid coupon bonds herein mentioned and said note evidence the only indebtedness sought to be readjusted in and by said plan of readjustment and the holders of said bonds and note are the only creditors of Petitioner affected by said plan within the meaning of said last mentioned act. That none of said indebtedness is owned or held by Petitioner. [246]

(Testimony of R. A. Grant.)

XVII.

That Reconstruction Finance Corporation, an agency of the United States of America, owns and holds not less than two-thirds in principal amount, viz., more than ninety-six (96) per cent in principal amount, of all indebtedness affected by said plan of readjustment. That said corporation owns and holds said promissory note and not less than two-thirds in principal amount, viz., more than ninety-five (95) per cent in principal amount, of each of the issues of bonds above mentioned. That a true and correct list of said indebtedness owned and held by said corporation is hereto attached, marked Exhibit "B" and by this reference made a part hereof.

XVIII.

That on April 7, 1937, said Reconstruction Finance Corporation, in writing dated on said day, accepted said plan of readjustment.

XIX.

That a list of all known holders of bonds issued or assumed by said district to be readjusted as aforesaid, other than said Reconstruction Finance Corporation, with their addresses, so far as known to Petitioner, and a description of their respective claims, so far as is known, which list shows only persons who have not accepted said plan, is hereto attached, marked Exhibit "C" and by this reference

(Testimony of R. A. Grant.)

made a part hereof. That said Exhibit "C" has been compiled from the best sources of information available to Petitioner and is supposed by Petitioner to be correct, but is intended by Petitioner as a list of claims and not as an admission of liability to the particular persons listed. Transfers of bonds or coupons thereof listed on said Exhibit "C", or interests therein, either voluntary or by operation of law, may have occurred unknown to Petitioner and to Petitioner's sources of information and Petitioner does not therefore intend by this paragraph to allege or admit the actual legal or equitable ownership of any bonds or coupons so listed, nor does Petitioner admit the authenticity of [247] any purported bonds or coupons held by any of the holders so listed, nor does Petitioner intend hereby to acknowledge any of said bonds or coupons so listed which are barred by any statute of limitations.

XX.

That a condensed summary showing separately the amounts and percentages of said indebtedness held respectively by said Reconstruction Finance Corporation and by others who have not accepted said plan is hereto attached, marked Exhibit "D" and by this reference made a part hereof.

(Paragraphs XXI to XXV, inclusive, alleged fairness of the plan and that certain actions and judgments were pending against petitioner.)

(Testimony of R. A. Grant.)

XXVI.

That in each and all of the above described actions the plaintiffs would, unless enjoined and stayed by the filing of this petition, take steps and proceedings looking to the enforcement of the claims of such plaintiffs for the payment of bonds or coupons involved in said actions and that such proceedings would interfere with and prevent the carrying out of said plan of readjustment and would in part, render ineffective the carrying out of said plan and would interfere with the jurisdiction of this Court herein.

Wherefore, Petitioner prays:

1. That the Court, by order, set a time and place for the hearing of this petition and prescribe the notice of such hearing to be given;

2. That, at such time and place, the Court hold a hearing upon said plan and, after due proceedings had, enter an interlocutory judgment confirming said plan;

3. That, upon rendition of such interlocutory judgment, the Court continue this proceeding for final hearing as to the value of the bonds of non-accepting holders, if any, and at such final hearing, after due proceedings had, the Court enter a judgment of acquisition, cancellation and condemnation by Petitioner of all bonds of [248] non-accepting holders, if any, and that such proceedings be had in conformity with such judgment as may be prescribed thereby or by the Court;

(Testimony of R. A. Grant.)

4. And that Petitioner have such other and further relief as may be meet and agreeable to equity.

STEWART, SHAW &
MURPHEY
By...
Attorneys for Petitioner.

State of California
County of Los Angeles—ss.

L. A. Hauser, being first duly sworn, deposes and says: That he is the President of the Board of Trustees of Palo Verde Irrigation District, the petitioner named in the foregoing petition, and makes this verification on its behalf; that he has read said petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief and as to those matters that he believes it to be true.

....

Subscribed and sworn to before me this .... day of April, 1937.

....
Notary Public in and for the County of Los Angeles, State of California.

Exhibit A attached to the petition was a resolution of the Board of Trustees of petitioner reciting that the Reconstruction Finance Corporation prior to April 7, 1937, purchased and owns more than 96 per cent in principal of the indebtedness of the

(Testimony of R. A. Grant.)

district and that the district does not own any of the bonds and that the Reconstruction Finance Corporation in writing dated April 7, 1937, accepted the plan and resolves that the following plan of readjustment is fair and adopts the same, the plan reading as follows: [249]

PLAN OF READJUSTMENT
PALO VERDE IRRIGATION DISTRICT

Palo Verde Irrigation District, being unable to meet its debts as they mature, desires to effect the following plan of readjustment:

Said debts consist principally of issued, outstanding and unpaid bonds issued or assumed by said District, to-wit, bonds issued by the following entities and in the amounts hereinafter set opposite the names of such entities, to-wit:

Entity		Amount
Palo Verde Mutual Water Company,	Principal Amount	$ 170,000.00
Palo Verde Joint Levee District of Riverside and Imperial Counties, California, first issue,	Principal Amount	$ 911,951.86
Palo Verde Joint Levee District of Riverside and Imperial Counties, California, second issue,	Principal Amount	$ 304,378.50
Palo Verde Drainage District,	Principal Amount	$ 850,000.00
Palo Verde Irrigation District, first issue,	Principal Amount	$1,725,000.00
Palo Verde Irrigation District, second issue,	Principal Amount	$ 213,000.00
	Total,	$4,174,330.36

Together with certain unpaid coupons upon each of said bonds.

Said debts also include promissory note of said District payable to D. A. Foley & Co. in the principal amount of $4,000.00

(Testimony of R. A. Grant.)

This District proposes and offers to deliver to each and all of the owners and holders of any of the above mentioned bonds the bonds of this District of the "Third Issue of Bonds (Refunding)" of principal amount equal to 24.81¢ per dollar of the principal amount of the bonds of the above mentioned company and districts owned and held by the above mentioned owners and holders. Each of said bonds shall be accompanied by all of its appurtenant coupons which have not heretofore been paid. In the event any such [250] unpaid coupons due prior to May 31, 1933, are missing, the principal amount of refunding bonds to be delivered by the District shall be reduced in the amount of 20.50¢ for each dollar of the face amount of such missing coupons. In the event any such unpaid coupons due May 31, 1933 or subsequently, are missing, the face amount of such coupons will be deducted from the face amount of such bonds to be delivered by the District.

The District also proposes and offers to deliver to the owner and holder of said $4000.00 note bonds of said District of said "Third Issue of Bonds (Refunding)" of principal amount equal to 25¢ per dollar of the principal amount of said note. The issuance of said "Third Issue of Bonds (Refunding)" was authorized by vote of the electors of said District at an election held on the 4th day of June, 1934, and by a resolution for the issuance and execution of such bonds adopted by said Board of Trustees at a meeting of said Board held on the 24th

(Testimony of R. A. Grant.)
day of July, 1934, as amended, to which resolution reference is hereby made; said refunding bonds shall bear interest at the rate of four per cent (4%) per annum, payable semi-annually on January first and July first, shall be dated July 1, 1934, shall be payable in such funds as are on the respective dates of payment of the principal of and interest on said bonds made legal tender for debts due the United States of America, shall be payable at the office of the County Treasurer of Riverside County, in the County of Riverside, California, or at the National City Bank of New York in the Borough of Manhattan, City of New York, State of New York, at the option of the holder and shall be in thirty (30) series to mature annually from and including July 1, 1938, to and including July 1, 1967; said bonds and the coupons thereon shall be in substantially the form set out in the resolution last mentioned and may be registerable at the option of the holder as to both principal and interest; said district will provide that the schedule of maturities of said bonds set out in said last [251] mentioned resolution shall be modified so as to provide bonds in such principal amounts as may be necessary to satisfy and comply with such final decree as may be made by the Superior Court in proceedings for the readjustment of the debts of said District under the Irrigation District Refinancing Act of California.

(Testimony of R. A. Grant.)

The District shall also deliver to each and all of the owners and holders of any interest coupons detached from the above-mentioned bonds, the bonds of said District of the "Third Issue of Bonds (Refunding)" of principal amount (a) equal to 20.50 cents for each dollar of face amount of any such detached coupons which came due prior to May 31, 1933, and (b) equal to the face amount of any such detached coupons due May 31, 1933, or subsequently.

The District will provide cash sufficient to pay to each owner and holder of bonds and coupons the difference between the sum of $100.00 (or nearest multiple thereof) and the principal amount of refunding bonds required hereunder to be delivered to such person, to the end that such cash and refunding bonds in the principal amount of $100.00 (or multiples thereof) shall be disbursed to such person.

The resolution further provided that the plan be presented to the California District Securities Commission and that the Messrs. Stewart, Shaw & Murphey, as attorneys, be instructed to file a petition in the Superior Court under the Irrigation District Refinancing Act, praying that the plan be effected in accordance with the act.

Exhibit B was a list of securities stated to be owned by the Reconstruction Finance Corporation, and in the following total amounts:

(Testimony of R. A. Grant.)

Bonds of Palo Verde Mutual Water Company,	$169,900.00
Bonds of Palo Verde Joint Levee District of Riverside and Imperial Counties, California (First Issue)	$886,951.86
Second Issue	$290,378.50
Bonds of Palo Verde Drainage District	$834,000.00
Bonds of Palo Verde Irrigation District (First Issue)	$1,649,000.00
	[252]
Second Issue	$208,000.00
Promissory note of Palo Verde Irrigation District to D. A. Foley & Co.	$4,000.00

Exhibit C was a list of bondholders who had not accepted the plan and included the respondents and also some few others totaling $136,000.00.

Exhibit D was a more condensed summary purporting to show that the Reconstruction Finance Corporation hold $4,042,230.36 or 96.74 per cent of all debts and that all other creditors including the respondents hold $136,100.00 or 3.26 per cent of the debt.

Respondents' counsel on behalf of some of respondents whom he had contacted, proposed and suggested a modification of the plan of adjustment

and stated that as a practical matter, the plan was something that went into effect some four or five years before. The bondholders were discouraged and most of them turned in their bonds in claims and drew their money from the Reconstruction Finance Corporation before there were any proceedings of any kind. Then the petitioner and respondents went into court under Section 80, went through that litigation and then went through the litigation under the state act proceeding and now are back in court. Conditions have changed a great deal as the evidence indicates, and also there are two or three different classes of bondholders. That is there were drainage bonds, levee bonds, and irrigation bonds, and also a promissory note for $4,000. Then there was a private deed of trust which secured certain notes covering most of the properties. The private mortgage bondholders received 50 cents on the principal of their bonds and the Reconstruction Finance Corporation has been paid 4 per cent interest. The respondents of whom counsel spoke, Jordan and Covell, would be willing to accept 50 cents on the principal with the 4 per cent interest and as to the respondents whom counsel had contacted, if they could [253] get that adjustment, it would end the whole case. There is a section in the Act which says the Court can make a change or modification of the plan at any time before the Court confirms a plan, though it is not binding upon the district until the district has accepted such modification.

The Court declined to consider the plea, stating that that was a matter for counsel. [254]

The foregoing Narrative Statement of Evidence is hereby settled as being true and complete, and is hereby approved.

Dated: March 13, 1939.

GEO. COSGRAVE
U. S. District Judge.

STIPULATION

It is stipulated by and between the appellants and appellee herein that the foregoing Narrative Statement of Evidence may be signed by the court and is a complete condensed statement of the oral and documentary evidence adduced at the hearing herein on July 18, 1938, and shall constitute a part of the record on the appeals in this cause to be used in lieu of the reporter's transcript of proceedings and testimony and exhibits.

Dated: March 3, 1939.

W. COBURN COOK
CHAS. L. CHILDERS
Attorneys for Appellants
STEWART, SHAW & MURPHEY
By ARVIN B. SHAW, JR.
Attorneys for Appellees.

[Endorsed]: Filed Mar. 13, 1939. [255]

[Title of District Court and Cause.]

PETITION FOR ORDER ALLOWING APPEAL

To the above entitled Court and the Honorable Judges thereof:

Whereas, James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin, a corporation, respondents and objecting creditors in the above entitled proceeding consider themselves aggrieved by the order and interlocutory decree of the above entitled Court rendered in the above entitled proceeding which decree is entitled "Interlocutory Decree Confirming Plan of Composition of Debts" and is dated the 6th day of October, 1938, and is signed by the Honorable George Cosgrave, for the reasons and because of the errors set out in the Assignment of Errors presented and filed with this petition.

Now Therefore, the said respondents and objecting creditors do hereby appeal from the aforesaid order and decree to the [257] United States Circuit Court of Appeals for the Ninth Circuit upon all of the grounds and for the reasons specified in the assignment of errors filed herewith and pray that said appeal may be allowed and that a citation in due form shall be issued herein directed to the petitioner, Palo Verde Irrigation District in the above entitled proceeding commanding it to appear before the said Circuit Court of Appeals to do what may be adjudged to be done in the premises, and that a

transcript of the record, proceedings, and papers upon which order and decree was made shall be duly made and authenticated and sent to the aforesaid Circuit Court of Appeals, and that such other and further order may be made as may be proper.

Dated: October 31, 1938.

W. COBURN COOK
CHAS. L. CHILDERS
Attorneys for Respondents named in the above petition.

[Endorsed] Filed Oct. 31, 1938. [258]

(Title of District Court and Cause.)

ORDER ALLOWING APPEAL

In the above entitled case (mentioned in the petition to which this order is attached), it is ordered that the appeal therein prayed for be and the same is hereby allowed, and the Court hereby fixes the amount of the cost bond to be given by the appellants, the respondents named in said petition, in the sum of $250.

Dated: October 31, 1938.

GEO. COSGRAVE
United States District Judge.

[Endorsed]: Filed Oct. 31, 1938. [259]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The appellants James H. Jordan, First National Bank of Tustin, California, a corporation, J. R. Mason, George F. Covell and L. F. Abadie in connection with their petition for an order allowing an appeal, make the following assignment of errors, which they aver occurred at the trial and determination of this proceeding and in the rendering of the decree appealed from:

1. The court erred in approving and confirming the plan of composition mentioned in the interlocutory decree.

2. The court erred in overruling objections of appellants to the jurisdiction of the court and to the introduction of evidence under the petition.

3. The court erred in finding that none of the matters alleged in the present petition are res judicata, and in finding that this court had power and jurisdiction to consider and adjudicate all of the matters in this proceeding. [260]

4. The court erred in approving and allowing the claim of Reconstruction Finance Corporation in the principal amount of $4,043,730.36, or any other amount.

5. The court erred in authorizing petitioner to repay to Reconstruction Finance Corporation money expended by it in purchasing old bonds.

6. The court erred in finding that Reconstruction Finance Corporation owned and held 96% or any

other amount of the indebtedness affected by the plan of composition, and in finding that it owns more than 95% or any other amount of each of the issues of bonds mentioned in said petition.

7. The court erred in finding that it is not true that 96% or any of the obligations of petitioner have been paid with funds obtained from Reconstruction Finance Corporation and in finding that it is not true that petitioner is obligated in an amount equal to 24.81% or any percentage of 96% of the obligations of petitioner or any sum less than the whole sum of principal and interest evidenced by the face of said obligations together with interest thereon at the rate of 4 per cent per annum. The court erred in finding that by the contract executed between petitioner and Reconstruction Finance Corporation, petitioner is obligated to said corporation to the full amount of principal and interest evidenced by the note and bonds held by said corporation, and in finding that said corporation has neither loaned nor advanced any funds to petitioner, and in finding that no amount of obligations held by Reconstruction Finance Corporation has in fact or in legal effect or otherwise been extinguished.

8. The court erred in finding that said plan of composition does not discriminate unfairly in favor of Reconstruction Finance Corporation.

9. The court erred in finding that Reconstruction Finance [261] Corporation did not accept said plan several years ago or at any time prior to May 5, 1938, and in finding that said corporation was not

nor was petitioner bound by said plan prior to the commencement of this proceeding, and in finding that said corporation is affected by said plan.

10. The court erred in finding said plan of composition to be fair, equitable and for the best interests of creditors affected thereby, and in finding that it did not discriminate unfairly in favor of any creditor or class of creditors, and in finding that said plan complies with the provisions of Chapter IX (formerly Chapter X) of the Bankruptcy Act, and that said plan has been accepted and approved as required by subdivision (d) of Section 83 of said act, and in finding that the offer of the plan and its acceptance are in good faith, and that petitioner is authorized by law to take all action necessary to carry out the plan.

11. The court erred in finding that said plan was not prepared or substantially completed or executed several years before the commencement of this proceeding, and in finding that said plan is a plan of composition pursuant to said Chapter X.

12. The court erred in finding that it is not true that the only persons or parties affected by said plan are owners and holders of bonds who have not consented or agreed to said plan, and in finding that all creditors or holders of securities who have consented to said plan are creditors affected by said plan.

13. The court erred in holding that all of the bonds and indebtedness included in the plan of com-

position are of one and the same class, and are payable without preference.

14. The court erred in holding that every bondholder should deposit any and all bonds and coupons issued or assumed by petitioner, with the disbursing agent within 30 days after publication of certain notice, or be forever barred from claiming or asserting, as against petitioner or any individually owned property [262] located within petitioner or the owners thereof, any claim or lien arising out of said bonds or coupons.

15. The court erred in enjoining and restraining appellants from commencing or prosecuting any suits, actions, or proceedings as to any indebtedness included in the plan of composition.

16. The court erred in holding that petitioner is unable to meet its obligations as they mature, and in holding that adverse agricultural conditions have affected petitioner, and in holding that petitioner has in good faith levied taxes to pay its bonded indebtedness, and that said taxes were greater than the ability of the land to produce or of farmers to pay, and in holding that petitioner was, or is or will continue to be unable to collect sufficient revenue to meet its obligations or a greater amount of revenue than will carry out the plan of composition.

17. The court erred in finding that said plan is not inequitable, unjust, or unfair to respondents or any of them, and in finding that petitioner will not be financially able to pay the obligations owned by respondents.

18. The court erred in finding that respondents are not severally entitled to judgment in their respective actions mentioned in this proceeding except for the restraining order issued in this proceeding, and in finding that said inchoate judgments and causes of action are provided for and are subject to composition.

19. The court erred in finding that the market value of the securities affected by the plan of composition was not greater than 14% of the principal amount between December 11, 1930 and January 30, 1934, and in finding that the market value, at no time between December 11, 1930 and the hearing herein, was greater than 21½% of the principal amount, and in finding that [263] the confirmation of said plan of composition is beneficial and for the best interests of petitioner's creditors.

20. The court erred in not holding the plan of composition unfair, in that the Reconstruction Finance Corporation is to be paid interest on its claims at 4 per cent per annum from July 1, 1934, while no interest whatever is to be paid to appellants.

21. The court erred in not holding the plan of composition unfair in that 50 per cent of their principal is paid to holders of Palo Verde Mutual Water Company bonds whereas only 24.81 per cent is to be paid to appellants.

22. The court erred in finding and ruling that said district is unable to meet its debts as they mature within the true meaning of said terms. The district is practically without leviable property and

inability to meet debts has reference to property and not yield from the unlimited and sovereign power of the state or of one of its district's to tax private property.

23. The court erred in finding said plan of composition fair in that it contains no provision for subsequent compensation for the impairing of obligations of the bondholders involved in this case in the event the district is subsequently able to pay its indebtedness in full through taxation or otherwise.

24. The court erred in finding said plan of composition fair in that it allows said debtor district to retain its water rights, reservoirs, power production facilities, lands, canals and water systems and other property, which properties were produced by moneys furnished by the bondholders of the district and the plan of composition was in no manner based upon any valuation of said properties.

25. The court erred in finding said plan fair in that it compels no surrender of any property of said district and it wholly fails to measure the new obligations of said district to pay by any valuation of any assets or property of said district. [264]

26. The court erred in finding that none of the obligations of petitioner referred to in the petition are also obligations of the County of Riverside, California, and in finding that this Court has power and jurisdiction to consider, allow, and approve a plan of composition affecting all of the obligations referred to in said petition.

27. The court erred in not holding that some of the bonds and interest coupons held by appellants and some of the outstanding obligations of Palo Verde Irrigation District are obligations of the Palo Verde Drainage District and some are obligations of the County of Riverside, California, and some arde obligations of the Palo Verde Joint Levee District of Riverside and Imperial Counties, and this court is without power or jurisdiction to consider or allow or approve any plan of composition or proceeding involving or affecting any of the said obligations of the Palo Verde Drainage District or of the County of Riverside, California, or of the Palo Verde Joint Levee District of Riverside and Imperial Counties.

28. The court erred in not holding that under the terms of California Statutes of 1937, Chapter 24, Section 19, said Reconstruction Finance Corporation and petitioner were bound by said plan of composition prior to the commencement of this proceeding and thereby said corporation is not affected by the plan referred to in this proceeding.

29. The court erred in not holding this proceeding barred because there was and now is a proceeding by petitioner pending under California Statutes of 1937, Chapter 24, for the same relief asked for herein, and which said statute is a bankruptcy statute.

30. The court erred in holding that petitioner and its obligations are subject and amenable to the bankruptcy power of the Congress of the United

States, and in holding that the State [265] of California has consented and can consent to this proceeding, and in not holding that any purported consent of the State of California to this proceeding under the terms and provisions of California Statutes of 1934 (extra session) Chapter 4 is unconstitutional and void in that said chapter violates the provisions of Article I, Section 16; Article IV, Section 1; Article X, Section 5; and Article XIII, Section 6 of the Constitution of the State of California, and Article I, Section 10, Clause 1 of the Constitution of the United States, and other constitutional provisions.

31. The court erred in not holding that said Chapter IX (formerly Chapter X) of the Bankruptcy Act was and is unconstitutional and that it did not violate the following sections and clauses of the Constitution of the United States: Article I, Section 10, Clause 1, and the Fifth and Tenth Amendments.

32. The court erred in not holding the plan unconstitutional because it interferes with sovereign governmental and political powers of the State of California, and in particular interferes with the power of taxation.

33. The court erred in not holding said Chapter IX is not a bankruptcy act which Congress could make applicable to Palo Verde Irrigation District.

34. The court erred in not holding that Palo Verde Irrigation District is a political subdivision created for the purpose of exercising and exercising

powers of sovereignty conferred upon said district by the laws of the State of California to carry out public governmental purposes, and it erred in holding that the confirmation of said plan of debt readjustment was not a void and illegal interference with the exercise of said sovereign powers so conferred upon said district.

35. The court erred in not holding that the power of Palo Verde Irrigation District to levy taxes on the lands or [266] property of private individuals is not property within the meaning of a true bankruptcy law.

36. The court erred in holding its jurisdiction extended to the Palo Verde Joint Levee District of Riverside and Imperial Counties and to Palo Verde Drainage District.

37. The court erred in approving and confirming the plan of composition without provisions for appellants' vested rights in trust funds and properties, including proceeds of assessments, tax certificates, land to which title has been taken under tax sales and proceeds thereof, the right to levying of annual assessments both in the past and future, and moneys impounded by writ or writs of mandamus heretofore issued.

38. The court erred in approving the said plan in that appellants' right of assessments against the personal property of landowners was not taken into consideration nor provided for.

39. The court erred in not holding that the plan of composition violates the Fifth amendment of the

Constitution of the United States in that mortgages and other obligations, junior to those held by appellants, of petitioner, and petitioner's landowners may be paid in full while appellants are to receive only 24.81 per cent of the principal of their holdings.

40. The plan further violates the Fifth amendment of the Constitution of the United States by taking appellants' property and giving it to the landowners of petitioner's district.

41. The plan takes the private property of appellants to pay the public debt of the State of California, and of the County of Riverside and Palo Verde Irrigation District without just compensation.

42. The court erred in determining that by these proceedings the obligation of the State of California upon the securities affected by the plan could be voided.

43. The court erred in holding that, at the option of [267] petitioner, bondholders are to be delivered refunding bonds instead of cash in payment of petitioner's obligations.

44. The court erred in making its conclusions of law as to all the matters mentioned in the foregoing assignment of errors.

Wherefore, appellants pray that the decree of the district court appealed from shall be reversed.

Dated: October 31, 1938.

W. COBURN COOK
CHAS. L. CHILDERS
Attorneys for Appellants.

[Endorsed]: Filed Oct. 31, 1938. [268]

(Title of District Court and Cause.)

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That we, James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin, a corporation, as Principals, and the American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and authorized to transact business in the State of California, as Surety, are held and firmly bound unto Palo Verde Irrigation District, and to the United States of America, and to the Clerk of said Court, in the full and just sum of Two Hundred Fifty & 00/100 Dollars ($250.00), to be paid to them and/or to each and/or to all or any of them and his or their respective successors if any, as their respective rights may appear, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this twenty-fourth day of October, 1938.

Whereas, the above-named Principals are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit to correct and reverse the order of said United States District Court in the above-entitled matter; and

Whereas, the above-named Principals obtained from said Court an order granting their petition for appeal in said matter and a citation directed to said

Palo Verde Irrigation District citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California.

Now, Therefore, the condition of the above obligation is such, that if the said Principals shall prosecute their said appeal to effect and answer all costs, if they shall fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and effect.

It is further stipulated as a part of the foregoing bond, that in case of the breach of any condition thereof, the above named District Court may, upon notice to the Surety, above named, proceed summarily in said action or suit to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against said [269] surety and award execution therefor.

JAMES H. JORDAN
J. R. MASON
L. F. ABADIE
GEORGE F. COVELL
FIRST NATIONAL BANK OF TUSTIN
By L. F. ABADIE
AMERICAN SURETY COMPANY OF NEW YORK

[Seal] By L. T. PLATT
Resident Vice-President.

Attest: D. DUCRAY.
Resident Assistant Secretary.

Bond #363,008-K—Premium $10.00 per annum.

State of California
City and County of San Francisco

On this twenty-fourth day of October in the year one thousand nine hundred and thirty-eight before me Thomas A. Dougherty, a Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared L. T. Platt and B. Ducray known to me to be the Resident Vice-President and Resident Assistant Secretary respectively of the American Surety Company of New York the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] THOMAS A. DOUGHERTY
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires August 4, 1939. [270]

The foregoing bond for costs on appeal is hereby approved this 31st day of October, 1938.

GEO. COSGRAVE
Judge of the United States
District Court.

[Endorsed]: Filed Oct. 31, 1938. [271]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS UNDER RULE 73 (b)

Notice is Hereby Given that James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin, a corporation, respondents in this cause hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the Interlocutory Decree Confirming Plan of Composition of Debts entered in this action on October 7, 1938.

Dated: November 4, 1938.

W. COBURN COOK,
CHAS. L. CHILDERS,
Attorneys for James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin, a corporation.

W. COBURN COOK,
Berg Building,
Turlock, California.

CHAS. L. CHILDERS,
Bank of America Building,
El Centro, California.

Copy mailed to Stewart, Shaw & Murphy, Attys. for Appellees, 11/7/38.

R. S. ZIMMERMAN,
Clerk.
By EDMUND L. SMITH,
Deputy.

[Endorsed]: Filed Nov. 7, 1938. [272]

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF ORIGINAL EXHIBITS TO CIRCUIT COURT OF APPEALS.

It appearing to the Court that, an appeal having been taken in this cause to the Circuit Court of Appeals, the original exhibits should be inspected by the Appellate Court and sent to the Appellate Court in lieu of copies, and the parties to this appeal having entered into a stipulation providing for the same and good cause appearing therefor;

It Is Ordered, that in lieu of copies, all of the original exhibits filed in this cause be sent by the clerk of this court to the Circuit Court of Appeals for the Ninth Circuit as a portion of the record on appeal to be used in the Circuit Court of Appeals as a portion of the record on appeal in accordance with Rule 23 of the Circuit Court of Appeals as it now reads or may be amended, and subject to such orders as may be made in the Circuit Court of Appeals relating to the printing of the same or portions thereof, and subject to such other orders as may be made in that court, and that the same be transported to the Circuit Court of Appeals by United States mail and returned to this court upon order of the Circuit Court of Appeals.

Dated: November 5, 1938.

GEO. COSGRAVE,
United States District Judge.

[Endorsed]: Filed Nov. 5, 1938. [273]

[Title of District Court and Cause.]

STIPULATION

It is stipulated between petitioner and respondents, L. F. Abadie, George H. Covell, First National Bank of Tustin, James H. Jordan, J. R. Mason, that in accordance with Rule 75 (i) of the Federal Rules of Civil Procedure, the Court may in lieu of copies, order the transfer to the Circuit Court of Appeals, of the original exhibits filed in this cause as a portion of the record on appeal, to be used in the Circuit Court of Appeals upon the appeal herein in accordance with Rule 23 of the Circuit Court of Appeals, and such orders as may be made in that Court.

Dated: October 31, 1938.

STEWART, SHAW &
MURPHEY,
By ARVIN B. SHAW, JR.,
Attorneys for Petitioner.
W. COBURN COOK,
Attorney for Respondents.

[Endorsed]: Filed Nov. 7, 1938. [274]

[Title of District Court and Cause.]

ORDER

Good cause appearing it is ordered in the above entitled cause in connection with the appeal of James H. Jordan, First National Bank of Tustin, California, J. R. Mason, George F. Covell, and L. F.

Abadie, and to the United States Circuit Court of Appeals for the Ninth Circuit, that the time for filing the record and transcript on appeal in said cause and the time for docketing of said cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, California, shall be and the same is enlarged and extended to and including the 29th day of January, 1939.

Dated: December 27th, 1938.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed Dec. 27, 1938. [275]

[Title of District Court and Cause.]

STIPULATION

It is stipulated by and between appellants and appellees herein that the time for docketing this appeal may be by the Court extended to January 29, 1939.

Dated: December 28, 1938.

CHAS. L. CHILDERS,
W. COBURN COOK,
Attorneys for Appellants.

STEWART, SHAW & MURPHEY,
By ARVIN B. SHAW, Jr.,
Attorneys for Appellees.

[Endorsed]: Filed Dec. 30, 1938. [276]

United States Circuit Court of Appeals for the Ninth Circuit.

Undocketed.

JAMES H. JORDAN, et al.,

Appellants,

vs.

PALO VERDE IRRIGATION DISTRICT,

Appellee.

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE.

Upon application of Mr. W. Coburn Cook, counsel for appellants, and good cause therefor appearing, It Is Ordered that the time within which appellants may file their transcript of record and docket the appeal in above cause be, and hereby is extended to and including February 28, 1939.

CURTIS D. WILBUR,
Senior United States Circuit Judge.

Dated: San Francisco, Calif., January 24, 1939.

A true copy,

Attest, January 24, 1939,

[Seal] PAUL P. O'BRIEN,
Clerk.

[Endorsed]:Order, etc. Filed Jan. 24, 1939. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Jan. 26, 1939. R. S. Zimmerman, Clerk. By M. J. Sommer, Deputy Clerk. [277]

[Title of Circuit Court of Appeals and Cause.]

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE.

Upon application of Mr. W. Coburn Cook, counsel for appellants, and good cause therefor appearing, It Is Ordered that the time within which appellants may file their transcript of record and docket the appeal in the above cause be, and hereby is extended to and including March 15, 1939.

CURTIS D. WILBUR,
United States Circuit Judge.

[Endorsed]: Filed February 17, 1939. Paul P. O'Brien, Clerk. [278]

[Title of Circuit Court of Appeals and Cause.]

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE.

Upon application of Mr. W. Coburn Cook, counsel for appellants, and good cause therefor appearing, It Is Ordered that the time within which appellants may file their transcript of record and docket the appeal in the above cause be, and hereby is extended to and including March 25, 1939.

CURTIS D. WILBUR,
Senior United States Circuit Judge.

[Endorsed]: Filed March 4, 1939. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Mar. 9, 1939. R. S. Zimmerman, Clerk. By M. J. Sommer, Deputy Clerk. [279]

[Title of Circuit Court of Appeals and Cause.]

STIPULATION FOR EXTENSION OF TIME

It is stipulated between appellants and appellees that the time within which appellants may file their transcript of record and docket the appeal in the above cause may be extended to and including March 25, 1939, for the reason that the parties are endeavoring to agree upon a Narrative Statement of the Evidence in this cause.

Appellants proposed Statement was served upon the appellee January 26, 1939, and the appellee was unable to complete his proposed changes therein before February 27, whereupon it was mailed to appellants' counsel at Turlock, California, where it is being rewritten. After being rewritten it must be re-examined by appellee and agreed to by both parties and forwarded for the Clerk of the United State District Court to Honorable Judge Cosgrave, who is at Fresno, for his approval, and by him returned to Los Angeles to be included in the Record on Appeal, and the Clerk of the United States District Court advises that this additional time is required. Otherwise the Record on Appeal is complete.

Dated: March 3, 1939. [280]

W. COBURN COOK,
CHAS. L. CHILDERS,
Attorneys for Appellants.
STEWART, SHAW AND MURPHEY,
By ARVIN B. SHAW, JR.,
Attorneys for Appellee. [281]

In the District Court of the United States for the Southern District of California—Central Division.

No. 31992-C
(In Bankruptcy)

In the Matter of Petition of Palo Verde Irrigation District, an Irrigation District, for Composition of Debts.

PRAECIPE

To the Clerk of the Above Entitled Court:

Please prepare in the above cause a transcript of the record to be transmitted to the United States Circuit Court of Appeals of the Ninth Circuit in pursuance to the appeal heretofore taken in said cause by all those certain parties named in the first paragraph of the Petition for an Order Allowing Appeal, which has been filed in this cause, being the same parties who are represented by the undersigned attorney, and include therein the following:

1. Petition for Composition of Debts.

2. Answer and Objections to Petition for Composition of Debts.

3. Findings of Fact and Conclusions of Law.

4. Interlocutory Decree Confirming Plan of Composition of Debts. [282]

5. Petition for and the Order Allowing Appeal.

6. Assignment of Errors.

7. Praecipe.

8. Citation on Appeal.

9. Clerk's Certificate to Record.

10. All pleadings filed herein or on behalf of appellants, including their motions.

11. All Orders made on Motions and all exceptions allowed upon Orders.

12. Undertaking on Appeal.

13. Stipulations.

14. Reporter's Transcript of Evidence and Proceedings at hearing of July 18, 1938.

15. Opinion of the Court.

Dated: October 31, 1938.

W. COBURN COOK,
CHARLES L. CHILDERS,
Attorneys for Respondents and objecting creditors named in the above Petition for Order Allowing Appeal.

[Endorsed]: Received copy this 1st day of November, 1938.

STEWART, SHAW & MURPHEY,
By ARVIN B. SHAW, JR.,
Attys. for Petitioner.

[Endorsed]: Filed Nov. 1, 1938. [283]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The appellants, James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National

Bank of Tustin, a corporation, hereby designate a complete record of all the proceedings and evidence in this cause for inclusion in the record on appeal herein.

Dated: November 4, 1938.

CHARLES L. CHILDERS,
W. COBURN COOK,
Attorneys for Appellants.

Receipt of a copy of the foregoing Designation of Contents of Record on Appeal is admitted this 28th day of December, 1938.

STEWART, SHAW & MURPHEY,
By ARVIN B. SHAW, JR.,
Attorneys for Appellee.

[Endorsed]: Filed Dec. 30, 1938. [284]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The appellants, James H. Jordan, First National Bank of Tustin, California, a corporation, J. R. Mason, George F. Covell, and L. F. Abadie, state that the points on which they intend to rely on the appeal in this cause are those which are set forth in the assignment of errors filed herein including: (1) Unconstitutionality of Chapter IX of the United States Bankruptcy Act. (2) Want of State consent. (3) The question of res judicata. (4) The question

of pendency of the proceedings in the State Court under Statutes of California, 1937, Chapter XXIV. (5) The question of whether the Reconstruction Finance Corporation is a creditor affected by the plan. (6) The want of good faith. (7) Failure of proof of insolvency. (8) The other points mentioned in the said assignment of errors.

Dated: January 20, 1939.

W. COBURN COOK,
CHAS. L. CHILDERS,
Attorneys for Appellants.

Due service and receipt of a copy of the foreging Statement of Points is hereby acknowledged this 23rd day of January, 1939.

STEWART, SHAW & MURPHEY
By ARVIN B. SHAW, JR.,

[Endorsed]: Filed Jan. 23, 1939. [285]

[Title of District Court and Cause.]

STIPULATION IN RE NOTICE OF HEARING AND RECORD ON APPEAL.

It Is Hereby Stipulated by and between petitioner above named and respondents herein, by their respective undersigned attorneys, as follows:

1. That the Clerk of the above entitled District Court did, on the 13th day of May, 1938, execute and issue, under the seal of said District Court, a

notice to creditors in the above entitled matter in the form and substance of the form of notice to creditors attached to that certain order given and made by the Honorable George Cosgrave, District Judge herein, dated and filed May 13th, 1938, and entitled "Order Approving Petition and for Notice", which said form of notice was marked "Exhibit A" and incorporated in said order by reference.

2. That thereafter, commencing May 17th, 1938, said petitioner caused a copy of said notice to be published in the "Los Angeles Daily Journal" and in the "Pacific Coast Edition The Wall Street Journal", in form and manner as prescribed in and by said order, and caused printed copies of said notice to be mailed in form and manner as required by said order to all creditors of petitioner district.

3. That on June 29th, 1938, affidavits of publication and mailing of said notice as above, showing compliance in all respects with the requirements of said order as to such publication and mailing, were filed herein. [286]

4. That said notice and said affidavits of publication and mailing may be omitted from the record on appeal herein and that this stipulation shall be incorporated in the printed record on appeal in lieu thereof.

5. That petitioner has in all respects correctly and fully complied with all jurisdictional requirements relating to the giving of notice prescribed in Section 83 of the National Bankruptcy Act and in the orders of said District Court precedent to the

hearing held before said District Court herein upon the plan of composition on July 18th, 1938.

6. That it is understood and agreed between petitioner and respondents that, notwithstanding the making of this stipulation or any other stipulation, act or omission heretofore made, done or omitted, petitioner reserves the full right to question, in such manner as it may be advised, the validity and effectiveness of each and every appeal sought herein to be taken by said respondents.

Dated this 26th day of January, 1939.

STEWART, SHAW & MURPHEY,
By ARVIN B. SHAW, JR.,
Attorneys for Petitioner.

W. COBURN COOK,
Attorney for Respondents J. R. Mason, L. F. Abadie, James H. Jordan, First National Bank of Tustin, California, and George F. Covell.

[Endorsed]: Filed Jan. 31, 1939. [287]

[Title of District Court and Cause.]

STIPULATION RELATING TO RECORD ON APPEAL

It is stipulated between appellants James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin, a cor-

poration, and appellee Palo Verde Irrigation District that there need be but one record on each of the appeals in this cause, which shall consist of the following, and shall be printed, except where otherwise stated:

1. Petition for Composition of Debts.
2. Answer and Objections to Petition for Composition of Debts.
3. Order approving Petition and for Notice.
4. Stipulation In Re Notice of Hearing and Record on Appeal.
5. Claim of Reconstruction Finance Corporation, and claims of James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin, a corporation.
6. Stipulation Relating to Evidence at Hearing on Merits of Plan. [288]
7. Narrative Statement of Evidence.
8. Minute Order of July 18, 1938.
9. Memorandum of Order of August 4, 1938.
10. Opinion of the Court.
11. Findings of Fact and Conclusions of Law.
12. Disapproval and Objections to Findings of Fact and Conclusions of Law.
13. Interlocutory Decree Confirming Plan of Composition of Debt.
14. Petition for Order Allowing Appeal.
15. Assignment of Errors.
16. Bond for Costs on Appeal.
17. Order Allowing Appeal.
18. Citation on Appeal.

19. Praecipe.

20. Notice of Appeal to the Circuit Court of Appeals under Rule 73 (a).

21. Designation of Contents of Record on Appeal.

22. Statement of Points.

23. Stipulation Dated October 31, 1938, Relating to Transfer of Exhibits Under Rule 75 (i).

24. Order of Transfer of Original Exhibits to Circuit Court of Appeals. (And the original exhibits so transferred and reporter's transcript, which need not be printed.)

25. Stipulation relating to Record on Appeal.

26. Clerk's Certificate to Record.

27. Orders Extending Time to Docket Appeal.

The record herein designated shall be in lieu of that required by the appellants' Praecipe and Designation of Contents of Record on Appeal, and is intended to conform also to Rule 73 (f) of Rules of Civil Procedure for District Courts.

Dated: March 1, 1939. [289]

W. COBURN COOK,
CHAS. L. CHILDERS,
Attorneys for Appellants.

This stipulation is signed by the undersigned attorneys for appellee subject to the following reservation.

That, notwithstanding the making of this stipulation, appellee reserves the full right to question, in such manner as it may be advised, the validity and

effectiveness of each and every appeal sought herein to be taken by said appellants.

STEWART, SHAW &
MURPHEY,
By ARVIN B. SHAW, JR.,
Attorneys for Appellee.

[Endorsed]: Filed March 2, 1939. [290]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing volume containing 290 pages, numbered from 1 to 290, in clusive, contains a full, true and correct copy of the (original) Citation on Appeal; Petition for Composition of Debts; Order Approving Petition and for Notice; Stipulation Relating to Evidence; Six Proofs of Claim; Answer to Petition; Minutes of July 18, 1938; Memorandum of Order and of Exception; Findings of Fact and Conclusions of Law; Disapproval and Objections to Findings of Fact and Conclusions of Law; Interlocutory Decree; Statement of Evidence; Petition for Appeal; Order Allowing Appeal; Assignment of Errors; Bond on Appeal; Notice of Appeal; Order for Transfer of Original Exhibits to Circuit Court of Appeals; Stipulation for Transfer of Original Exhibits;

Order Extending Time; Stipulation Extending Time; Order Extending Time on Appeal; Order Extending Time on Appeal; Order Extending Time on Appeal; Praecipe; Designation of Contents on Appeal; Statement of Points; Stipulation re Notice of Hearing and Record on Appeal; Stipulation Relating to Record on Appeal, which together with original Exhibits constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I Do Further Certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to $49.30, and that said amount has been paid me by the Appellant herein.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States for the Southern District of California, this 21st day of March, in the year of our Lord One thousand nine hundred and thirty-nine, and of the Independence of the United States the One hundred and sixty-third.

[Seal] R. S. ZIMMERMAN,

Clerk of the District Court of the United States for the Southern District of California,

By EDMUND L. SMITH,

Chief Deputy Clerk.

[Endorsed]: No. 9133. United States Circuit Court of Appeals for the Ninth Circuit. James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin, a corporation, Appellants, vs. Palo Verde Irrigation District, an Irrigation District, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 22, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Title of District Court and Cause.]

ORDER

Good Cause Appearing, It Is Ordered in the above-entitled case in connection with the appeal of James H. Jordan, First National Bank of Tustin, California, J. R. Mason, George F. Covell, and L. F. Abadie to the United States Circuit Court of Appeals for the Ninth Circuit that the time for filing the record and transcript on appeal in said cause and the time for docketing of said cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco shall be and the same is enlarged and extended to and including December 30, 1938.

Dated: November 28, 1938.

G. COSGRAVE,
U. S. District Judge.

[Endorsed]: Filed Nov. 30, 1938. Re-filed March 22, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 9133

JAMES H. JORDAN, et al.,
Appellants,

vs.

PALO VERDE IRRIGATION DISTRICT,
Appellee.

STATEMENT OF POINTS RELIED UPON ON APPEAL.

The appellants state that they intend to rely upon the points mentioned in the Statement of Points by Appellants, and Assignment of Errors in the record herein, on each of the appeals herein.

Dated: March 29, 1939.

W. COBURN COOK,
CHAS L. CHILDERS,
Attorneys for Appellants.

[Endorsed]: Filed March 29, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD FOR PRINTING

The appellants designate the following as those parts of the record as necessary for the consideration of the points upon which the appellants intend to rely in this appeal, and for printing:

All those parts of the transcript and record on appeal provided in the "Stipulation Relating to Record on Appeal" herein, to be printed, and in addition, stipulations and orders relating to extension of time to docket the appeal.

It will be found that the said stipulation provides for the printing of the entire transcript on appeal, except the original exhibits and reporter's transcript, which it was provided in the stipulation need not be printed.

Dated: March 29, 1939.

W. COBURN COOK,
CHAS. L. CHILDERS,
Attorneys for Appellants.

[Endorsed]: Filed March 29, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California,
County of Stanislaus—ss.

Esther Mortensen, being first duly sworn, deposes and says:

That she is a citizen of the United States, resident of the County of Stanislaus, over the age of eighteen years, and not a party to nor interested in the above entitled cause; that on the 30th day of March, 1939, she placed a full, true, and correct copy of the Statement of Points Relied Upon on Appeal, and Designation of Record for Printing, filed herein, in an envelope, duly sealed and deposited the same in the United States Post Office at Turlock, California, with the postage thereon fully paid, and addressed to Stewart, Shaw and Murphey, Attorneys at Law, 835 Rowan Building, Los Angeles, California; that there is a regular daily communication by mail between Turlock, California and Los Angeles, California.

ESTHER MORTENSEN.

Subscribed and sworn to before me this 30th day of March, 1939.

[Seal] J. ALFRED SWENSON,

Notary Public in and for the County of Stanislaus, State of California.

[Endorsed]: Filed April 5, 1939. Paul P. O'Brien, Clerk.

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No. 9133

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation),

Appellants,

vs.

PALO VERDE IRRIGATION DISTRICT, an Irrigation District,

Appellee.

APPELLANTS' OPENING BRIEF.

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No. 9133

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation),

Appellants,

vs.

PALO VERDE IRRIGATION DISTRICT, an Irrigation District,

Appellee.

APPELLANTS' OPENING BRIEF.

JURISDICTIONAL FACTS.

This proceeding is a petition for composition of debts of the Palo Verde Irrigation District, an irrigation district, organized under the provisions of Stats. Cal. 1923, page 1067. The proceeding is purportedly authorized under the provision of Chapter IX of the Bankruptcy Act of 1898. (11 U. S. C. Sections 401-404.)

The jurisdiction of this Court in this appeal has been determined in an order made in this Court on June 28, 1939, denying motions to dismiss the appeal.

PLEADINGS.*

The petitioner herein filed its petition for composition of debts in the District Court May 13, 1938 (Tr. p. 39) whereupon an order for notice to creditors was given. (Tr. p. 40.) The appellants filed their proofs of claim (Tr. pp. 70 to 89) in due time. The appellants served and filed on July 6, 1938 (Tr. p. 70) their answer and objections to the petition for composition of debts, and the hearing on the plan of composition came on before the Court July 18, 1938 (Tr. p. 147) whereupon evidence was introduced and the cause was submitted, after objections made upon three fundamental grounds which are briefed herein. (Tr. p. 148.) The evidence consisted of a transcript of testimony taken before the Superior Court of Riverside County in a proceeding for readjustment of the debts of the petitioner under Cal. Stats. 1937, Ch. 24. The Court announced its decision; findings were submitted to the Court. The appellants in due time endorsed their disapproval and objections to the findings upon

---

*The appellants consider the following portions of the transcript of record as important for consideration of the appeal:

1. Petition. (Tr. p. 3.)
2. Answer and Objections. (Tr. p. 57.)
3. Findings. (Tr. p. 92.)
4. Objections to Findings. (Tr. p. 124.)
5. Decree. (Tr. p. 134.)
6. Plan of Composition. (Tr. p. 21.)
7. Proceedings of Trial. (Tr. pp. 147-150 and pp. 336-338.)
8. Petitioner's Exhibits. (Tr. pp. 153, 171, 174, 184, 201, 225, 236, 264, 270, 272, 273, 274.)
9. Respondents' Exhibits. (Tr. pp. 178, 242, 246, 292, 295, 315, 318, 150, 325.)
10. Testimony of Petitioner's Witness Faries. (Tr. p. 171.)
11. Testimony of Petitioner's Witness Malmgren. (Tr. p. 256.)
12. Testimony of Petitioner's Witness Meyer. (Tr. p. 152.)
13. Testimony of Petitioner's Witness Wagner. (Tr. p. 286.)
14. Testimony of Petitioner's Witness Williams. (Tr. pp. 184, 194.)
15. Stipulations. (Tr. pp. 193, 223.)
16. Minute Book Entries. (Tr. pp. 278-279.)
17. Stipulation. (Tr. pp. 295-307.)

the same (Tr. p. 92) which were overruled by the Court (Tr. p. 134) and the findings were entered on October 7, 1937, together with an interlocutory decree confirming the plan of composition. (Tr. pp. 124, 147.) Thereafter appellants took their appeal in due and proper form as determined by the order of this Court entered herein June 28, 1939.

STATEMENT OF FACTS.

About 1877 Samuel Blythe acquired about 40,000 acres along the Colorado River, which is now a part of Palo Verde Irrigation District. He obtained the first water right upon the Colorado River.[1]

In 1908 the Mutual Water Company was organized and this company, which was a private corporation, on February 1916 executed a deed of trust conveying its irrigation system to a bank, in trust, as security for the payment of coupon bonds of the company in the principal amount of $500,000 payable serially from 1921 to 1936 at 6% interest. $170,000 of these bonds are involved in this proceeding.

The Palo Verde Drainage District is a public corporation organized under the provisions of Cal. Stats. 1903, page 291 (Appendix p. 19), on August 16, 1921. This corporation on December 1, 1921, issued coupon bonds in the amount of $850,000 payable serially from 1933 to 1942 bearing 6% interest, all of which bonds

1. For the history of the Palo Verde Project see page 327, Bulletin 21, Department of Public Works of the State of California printed by California State Printing Office and introduced as an exhibit in this case (Tr. p. 256), and see also evidence by E. W. Williams. (Tr. p. 184.)

were subsequently sold and are involved in these proceedings.

The Palo Verde Joint Levee District of Riverside and Imperial Counties, California, was organized June 17, 1914, under the provisions of Stats. Cal. 1905, page 327. (Appendix p. 27.) This District constructed, operated and maintained a levee system along the Colorado. On May 1, 1918, the Levee District under authority of Stats. Cal. 1911, page 303, issued its first issue of coupon bonds in the principal amount of $1,253,951.86, payable serially from 1919 to 1958, bearing 6½% interest. On November 1, 1922, the Levee District issued a second issue of bonds in the principal amount of $371,378.50 payable serially from 1923 to 1962 with interest at 6½%. Of the first issue $911,951.86 principal of bonds and of the second $304,378.50 principal of bonds are involved in these proceedings.

Both the Drainage District and the Levee District (but not the Mutual Water Company) were public corporations and complete provisions for the annual levy and collection of unlimited assessments for payment of the bond issues were set forth in the respective acts, found in the Appendix.

The Palo Verde Irrigation District (sometimes herein referred to as the district) is an irrigation district organized under the provisions of a special act of the Legislature known as the "Palo Verde Irrigation District Act" being Stat. Cal. 1923, page 1067. (Appendix p. 34.) It embraced 95,000 acres of land,

the major part of which is situated in the County of Riverside. The office of the district is at Blythe.

This district was organized for the purpose of taking over the properties and in general the functions of the Levee District and the Drainage District and acquiring the properties of the Palo Verde Mutual Water Company. Relevant provisions of this act are found in the Appendix. Palo Verde Irrigation District under the act assumed the obligation of the bond issues of the two public corporations and of the one private corporation. Sections of the act 12 and 13 reserved to the bondholders the rights which they had under the former act. These sections declared that the Drainage District and the Levee District ceased to exist "*except insofar as may be necessary to preserve the rights of bondholders and other creditors;* * * *." The question of the extent of this right and its effect upon these proceedings is discussed hereafter in this brief.

The Palo Verde Irrigation District itself issued certain bonds. On September 1, 1925, it issued the first issue in the principal amount of $3,287,000, payable serially from 1937 to 1955 and issued a second issue of bonds of the same date in the amount of $213,000, payable serially from 1937 to 1955, both bond issues bearing 6% interest. All the bonds of the second issue were sold and of the first issue $1,725,000 were sold and substantially all of these issues which were sold are involved in these proceedings.

Of the foregoing bond issues the appellants own the following amounts, plus matured interest coupons:

L. F. Abadie, $15,000 principal Irrigation District bonds (unmatured);

George F. Covell, $10,000 principal Irrigation District bonds (due 1952);

James H. Jordan, $3000 (matured) Drainage District bonds; $18,000 (mostly matured) Levee District bonds; also $3380 coupons from bonds not owned by Jordan;

J. R. Mason, $13,000 Irrigation District (matured and unmatured) bonds; $14,000 Levee District bonds (matured and unmatured);

First National Bank of Tustin, $6000 Principal (matured).

In 1933 the district applied to the Reconstruction Finance Corporation (sometimes referred to herein as the R. F. C.) for a loan under Section 36 of the Emergency Farm Mortgage Act (Title 43, Section 403 U. S. C.) to enable it to reduce its debt. The loan was granted. (Tr. p. 201.) The electors of the district accepted the loan and voted refunding bonds. The bondholders deposited their bonds in escrow *"to or upon the order"* of the district. (Tr. p. 172.) The district *ordered* the surrendered bonds delivered to the R. F. C. (Tr. p. 179) and paid the expense of the escrow. The R. F. C. loaned and disbursed 24.81 cents on the dollar. That was all done even before the first bankruptcy petition was filed in 1935. The R. F. C. now claims to own these bonds. The appellants claim that they are fully liquidated, and that the R. F. C. has no other right than to the issuance and delivery of

new, refunding bonds representing the amount of the loan, at 24.81 cents.

On March 29, 1935, the Palo Verde Irrigation District filed a petition in the United States District Court for the Southern District of California for the adjustment of its debts under Section 80 of the Bankruptcy Act of 1898. Those proceedings involved these same appellants and their same claims, and the same bond issues, and therein the district sought confirmation of a plan of readjustment of its debts substantially the same as the present. (See Tr. p. 295 for stipulation concerning these facts.) The bankruptcy petition was contested by these appellants and the bankruptcy petition referred to actions of these appellants which were then pending and are still pending against the district for enforcement of certain rights of these appellants. Upon the filing of the bankruptcy petition a restraining order was issued restraining the prosecution of these actions. The cause came on for trial and was tried on the merits and submitted. On December 8, 1936, the United States District Judge entered a dismissal of the cause on the grounds of unconstitutionality. (Tr. p. 298.) Subsequently the Palo Verde Irrigation District appealed from the order of dismissal to this, the Circuit Court of Appeals. The appeal was dismissed.

Thereafter the appellants, except Covell, on the 29th day of December, 1936, obtained an Alternative Writ of Mandate, from the Superior Court of Riverside County (Tr. p. 305) directed to the Palo Verde Irrigation District and its officers and the depositary of the district, directing them to pay appellants' claims

on their matured bonds and coupons prior to any payment of interest to the R. F. C.

Thereafter the Palo Verde Irrigation District, in April, 1937, filed a "Petition for Readjustment of Debts" under the Irrigation District Refinancing Act (Appendix p. 1) for readjustment of its debts and set forth substantially the same plan as is here involved. (Tr. p. 325.) This case went to trial before the Superior Court of Riverside County in November, 1937, and resulted in a decision in favor of the district in April, 1938. On the same day that the Superior Court handed down its opinion the United States Supreme Court announced its decision in the *Bekins* case, holding that the present Chapter IX of the Bankruptcy Act is constitutional. Whereupon on May 13, 1938, the district filed its petition in bankruptcy in the United States District Court; and subsequently made a motion to dismiss the bankruptcy proceedings pending in the State Court under the Irrigation District Refinancing Act. The question of the dismissal of these proceedings is now on appeal in the State Supreme Court (Tr. p. 149) but prosecution of the appeal is enjoined by these proceedings.

The plan of composition has been substantially the same in all of these cases. It is set forth on page 21 of the transcript and provides for payment of 24.81 cents per dollar of principal of the bonds and nothing for interest. At the option of the district, refunding bonds may be delivered to the appellants. In the main, it is proposed to deliver (refunding) bonds to the R. F. C. and pay 24 cents in cash to the appellants.

NATURE OF LIABILITY UNDER APPELLANTS' BONDS.

The nature of the functions of the petitioner district is discussed in the argument, but a word should be said as to the nature of the obligation under the bonds. The bonds of each of the three public agencies are general obligations. Their nature as such is discussed in the case of *Judith Basin v. Malott,* 73 Fed. (2d) 142. In effect these bonds are a *senior* claim; mortgages and deeds of trust are junior.

The same interests that have repeatedly sought to destroy similar public bonds as in the case of *Malott* and in the *Roberts v. Richland Irrigation District* case (289 U. S. 71, 53 S. Ct. 519) now again seek by a new and different method to destroy them.

THE QUESTIONS INVOLVED.

When the cause came on for hearing before the District Judge objections to the introduction of any evidence were made (Tr. p. 148) on the grounds that as shown by the facts admitted (1) There was a proceeding pending in insolvency under the state law; (2) The cause was *res judicata;* (3) The plan had been carried out, out of Court. This objection was overruled.

The cause was tried and decision rendered. Objections to the findings were disallowed. (Tr. p. 124.) The decree was entered and the appeal raises matters of fact and of law improperly determined by the Court.

SUMMARY OF ARGUMENT.

The interlocutory decree confirming the plan of composition herein should be reversed because:

1. The District Court was without jurisdiction to enter its decree touching the governmental and fiscal affairs of the Palo Verde Irrigation District, by the terms of Chapter IX;

2. The pendency of the insolvency proceeding under Cal. Stats. 1937, Chapter 24, was a bar to these proceedings;

3. The cause is *res judicata;*

4. The R. F. C. is not a creditor affected by the plan and cannot vote upon the proposition;

5. The plan had already been consummated long prior to the filing of the petition;

6. The judge failed to classify the creditors properly;

7. The plan is grossly unfair and inequitable;

8. The plan is not proposed in good faith;

9. The State of California is the owner of the assets and may not repudiate its public debts, nor can the district, a public trustee, take bankruptcy;

10. Trust funds and property are unlawfully taken by the proceeding;

11. The liability of juristic persons not before the Court is unlawfully voided;

12. The District is not authorized by law to carry out the plan.

13. The State of California cannot under its own Constitution consent or be a party to these proceedings;

14. Chapter IX is unconstitutional as applied in these proceedings.

ARGUMENT AND AUTHORITIES.

FIRST PROPOSITION: BY THE TERMS OF THE STATUTE THE COURT WAS WITHOUT JURISDICTION.

Assignment of Error No. 34 is as follows:

> "The court erred in not holding that Palo Verde Irrigation District is a political subdivision created for the purpose of exercising and exercising powers of sovereignty conferred upon said district by the laws of the State of California to carry out public governmental purposes, and it erred in holding that the confirmation of said plan of debt readjustment was not a void and illegal interference with the exercise of said sovereign powers so conferred upon said district."
>
> (Tr. p. 348.)

Assignment of Error No. 2 is as follows:

> "The court erred in overruling objections of appellants to the jurisdiction of the court and to the introduction of evidence under the petition."
>
> (Tr. p. 341.)

It is respectfully suggested that the trial Court was wholly lacking in jurisdiction. The petitioner being exclusively governmental in nature seems to be en-

tirely excluded by the terms of the act under which these proceedings were prosecuted.

In Section 83 (c) of the Bankruptcy Act, which is Section 403, Title 11, U. S. C., after stating that the Court may enjoin proceedings and put the plan temporarily into effect, it is provided:

> "* * * but shall not, by any order or decree, in the proceeding or otherwise, interfere with (a) any of the political or governmental powers of the petitioner; * * *"

To make doubly sure that the political or governmental affairs of the State were not to be interfered with, Congress inserted in the Act subdivision (i) of the same section (83) which reads as follows:

> "(i) Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any municipality or any political subdivision of or in such State in the exercise of its political or governmental powers, including expenditures therefor."

Then further, to guard against the Act failing entirely because some petitioner might be a governmental agent Congress inserted:

> "* * * That if any provision of this chapter, or the application thereof to any such taxing agency or district or class thereof or to any circumstance, is held invalid, the remainder of the chapter, or the application of such provision to any other or different taxing agency or district or class thereof or to any other or different circumstances, shall not be effected by such holding."
>
> (Tit. 11, Sec. 401, U. S. C.)

Subdivision (c) 11 of the old Section 80 is as follows:

> "* * * but (11) shall not, by any order or decree, in the proceeding or otherwise, interfere with (a) any of the political or governmental powers of the taxing district. * * *"

The similarity between subdivision (c) 11 of Section 80 and subdivision (c) of Section 83 above quoted is at once striking. Indeed they are identical with one exception. The last two words of the old act are "taxing district" and the last word of the new act is "petitioner". This difference may be more important than it at first appears. The Court held the old act unconstitutional in the *Ashton* case (*Ashton v. Cameron County Water Improvement Dist. No. 1,* 298 U. S. 513).

The basis of the decision in the *Ashton* case may be stated in two or three rather short quotations from that opinion where the Court said (531):

> "If obligations of States or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them; although inhibited, the right to tax might be less sinister. And really the sovereignty of the State, so often declared necessary to the federal system, does not exist."

And again:

> "The constitution was careful to provide that 'no State shall * * * pass any * * * Law impairing the Obligation of Contracts'." "This she may not do under the form of a bankruptcy act or otherwise."

> (Authority.) "Nor do we think she can accomplish the same end by granting any permission necessary to enable Congress so to do.
>
> "Neither consent nor submission by the states can enlarge the powers of Congress; none can exist except those which are granted." (Authority.) "The sovereignty of the state essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation."

The new act, so far as the constitutional question is concerned, was approved in the *Bekins* case (*U. S. v. Bekins,* 304 U. S. 27). After quoting at some little length from the report of the Judiciary Committee of the House, which comimttee report we will presently refer to, Mr. Chief Justice Hughes stated (51):

> "We are of the opinion that the Committee's points are well taken and that chapter 10 is a valid enactment. The Statute is carefully drawn so as not to impinge upon the sovereignty of the State."

It will be observed that the Court in the *Bekins* case does not assent to the proposition that the sovereignty of the State may be impinged upon.

The material differences between the two statutes, if any there be, are elusive in the extreme. The *Ashton* case held the act void. The *Bekins* case holds a very similar act valid. One of two things, therefore, seems certain. The Court in the *Bekins* case must have either found some material difference between the old and the new statutes, even though slight it may be, which clears away the difficulties found in the old statute, or the *Ashton* case is actually over-

ruled. If the *Bekins* overrules the *Ashton* case, and it is certain that it does in some respects, such as, for instance, State consent, then the plea in this case of *res judicata* would seem to be perfectly good, but that is another point which we are not here discussing, but will presently discuss.

The Court in the *Bekins* case (50), referring to the *Ashton* case and its holdings in that case, stated:

> "* * * that if obligations of States or their political subdivisions might be subjected to the interference contemplated by Chapter IX, they would no longer be 'free to manage their own affairs'. In enacting Chapter X the Congress was especially solicitous to afford no ground for this objection."

The Court does not give us the differences between the two acts or wherein the solicitation of Congress has removed the objection found in the *Ashton* case, but unless the Court actually overruled the *Ashton* case, it must have found some difference upon this particular point and that difference may be as between the words "petitioner" set out above from Sec. 83(c) and the words "taxing district", set out above from Sec. 80(c) (11). And we can see some little difference between those terms.

In the old Act the term "taxing district" was defined as,

> "any municipality or other political subdivision of any State, including (but not hereby limiting the generality of the foregoing) any county * * *" etc.

including irrigation districts.

Now, the Court in the *Ashton* case held the old act void. The respondent in that case was a water improvement district exactly similar to an irrigation district. The Court said:

> "If Federal Bankruptcy laws can be extended to respondent, why not to the State?"

It will be remembered that in the old act the respondent was defined as a political subdivision. Again in the same decision the Court said: (527)

> "It is plain enough that respondent is a political subdivision of the State, created for the local exercise of her sovereign powers, and that the right to borrow money is essential to its operations * * * Its fiscal affairs are those of the State, not subject to control or interference by the national government, unless the right so to do is definitely accorded by the Federal Constitution."

Now we turn to the new act, the one construed in the *Bekins* case, and we find the term "petitioner" defined in Section 82 as "any taxing agency or instrumentality referred to in Section 81 of this Chapter."

When we look at Section 81 we find that irrigation districts and numerous other agencies are named by name but they are not defined as political subdivisions, and at the end of Section 81 we find this very significant language, already quoted above:

> "Provided, however, that if any provision of this chapter, or the application thereof to any such taxing agency or district or class thereof or to any circumstance, is held invalid, the remainder of the

> chapter, or the application of such provision to any other or different taxing agency or district or class thereof or to any other or different circumstances, shall not be affected by such holding."

The *Ashton* case had held old Chapter IX to be void because it permitted interference with the governmental sovereignty of the State. The *Bekins* case seems to hold that the governmental interference has been avoided in the new statute, at least so far as its general constitutionality is concerned.

When we turn to the new statute we find that Congress has named a great number of agencies, and, not being sure but that some of these agencies may be strictly governmental and thus fall into the category condemned in the *Ashton* case, it provides at the end of Section 81 as above quoted and proceeds to at least attempt to save the act as to those which do not fall within the class which Congress has no power to interfere with.

Since all of the agencies in the old act, by definition of Congress, fell within the sovereign governmental class the old act was condemned. Now, since it is possible that some or perhaps a large number of the agencies named in the new act would not come within that class, the act as a whole is not condemned, and it is not condemned as to the particular agency before the Court, because the Courts of California had not held such agencies to be strictly governmental. This seems to be a reasonable construction to place upon the *Bekins* decision, and indeed seems to be about the only

way that it can be explained without reaching the conclusion that the *Ashton* case is actually overruled.

This construction seems to be borne out further by the decision in the *Bekins* case where the Court quotes with approval from the report of the Judiciary Committee of the House and states: (51)

> " 'The bill here recommended for passage expressly avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties. *No interference with the fiscal or governmental affairs of a political subdivision is permitted.* * * * No involuntary proceedings are allowable, and no control or jurisdiction over that property and those revenues of the petitioning agency *necessary for essential governmental purposes is conferred by the bill.' "* (Italics supplied.)

Now, the committee of Congress apparently had this very point in mind, namely, that it could not pass an act that would apply to a state or to any strictly governmental agent of the state but only to those agencies that exercised private or proprietary functions. Congress seemed to recognize that the first act had failed largely because, if not entirely because, it applied entirely, by definition, to municipalities and political subdivisions which exercise governmental or sovereign powers. In the new act it tried to avoid that difficulty by withholding jurisdiction from the Court to deal with those agencies which are strictly governmental and the governmental functions of the agencies which may be partly governmental and partly proprietary.

We now come to a consideration of the nature of an irrigation district in California.

It is not important on this particular point whether the *Ashton* case was actually overruled or not. Congress in the very act under which such jurisdiction as the Court could exercise was conferred, expressly provided that no order could be made that would interfere with any of the political or governmental powers of the petitioner. It becomes important therefore to ascertain whether or not the petitioner has any powers which the Court had the right, by its order, to interfere with. Clearly the power of the Court is limited by this provision and if it should be found that every power and function of the petitioner is governmental then the proceeding would have to end right there as it would be perfectly idle for the Court to go through the processes but without any authority to make any order or decree.

For many years the exact nature of an irrigation district has been a subject of judicial concern. That question has been definitely crystalized in California, so far as California irrigation districts are concerned, since the decision in the *Bekins* case.

In the case of *El Camino Irrigation District v. El Camino Land Company*, 96 C. D. 505, 508, the Court states:

> "But the cases make a sharp distinction between municipal corporations, such as the cities in the Kuback Co. and Marin Water and Power Co. cases, and state agencies such as irrigation or reclamation districts. These latter are agencies

of the state whose functions are considered exclusively governmental; their property is state owned, held only for governmental purposes; they own no land in the proprietary sense, within the rule of defendant's cases. (See Whiteman v. Anderson-Cottonwood Irrigation District, 60 Cal. App. 234; Turlock Irrigation District v. White, 186 Cal. 183, 187; Wood v. Imperial Irrigation District, 216 Cal. 748, 752.) Once it is established that the property is owned by the state or its agency, rather than by a municipal corporation, the rule of the Kuback Co. case becomes inapplicable. 'Our attention has been called to no act, and we have been unable to find any act of the legislature authorizing state property to be sold upon execution, whether such property is used either in a governmental or in a proprietary character. The purpose or capacity in which state property is held does not, so far as we have been able to ascertain, alter the rule that state property cannot be levied upon and sold, save and except as permitted by the legislature, and not being permitted, it cannot be done.' (Meyer v. State Land Settlement Board, supra, at p. 586.)

(4) There is another and conclusive answer to the contention of defendants, found in the terms of the Irrigation District Act. Section 29 of the act (Gen. Laws 1931, Act 3854) declares that property acquired by the district shall be held 'in *trust* for, and is hereby *dedicated* and set apart to the *uses and purposes set forth in this act'*. We have discussed the meaning and effect of this section in Provident Land Corporation v. Zumwalt, supra, and it is sufficient to point out here that the statute places these tax-deeded lands in a classification which necessarily makes them exempt from execution."

The still more recent case decided by the Supreme Court of California is that of *Anderson-Cottonwood Irrigation District v. Klukkert, as Assessor,* 97 C. D. 348. In the *Anderson-Cottonwood* case the district had taken over a good deal of land through its assessment proceedings and the County Assessor was threatening to assess these lands for county tax purposes and the proceeding was one to prohibit such an assessment. The Court reviewed the authorities at some length and said:

> "Irrespective of that which hereinbefore has been stated with respect to the rule that under a constitutional provision exempting state-owned property from taxation it is immaterial whether the property is held in a proprietary or a governmental capacity, it does not appear that the lands here involved are nonoperative, within the meaning contended for by respondents. In the recent case entitled El Camino Irrigation District v. El Camino Land Corporation et al., 96 Cal. Dec. 505, at pp. 508, 509, this court held that an irrigation district was an agency of the state, whose functions were considered exclusively governmental; that it owns no lands in a proprietary sense, its property being owned by the state and held only for governmental purposes. The court pointed out that under section 29 of the Irrigation District Act (Deering's Gen. Laws (1931), Act 3854, p. 1948) it was provided that property acquired by the district should be held 'in trust for', and was 'dedicated and set apart to the uses and purposes' set forth in the act. (See, also, Clough v. Compton-Delevan Irrigation District et al., 96 Cal. Dec. 509, 511; Moody v. Provident Irrigation District, 96 Cal. Dec. 512, 515.) Also, in the recent

case entitled Provident Land Corporation v. Zumwalt et al., 96 Cal. Dec. 497, where the economic history of irrigation districts in this state was reviewed at some length, it was held that lands acquired by the district under the provisions of the Irrigation District Act remain in trust, and that their proceeds, whether by sale or lease, were likewise subject to the trust."

A still more recent case is that of *Glenn-Colusa Irrigation District v. The Board of Supervisors of Colusa County,* 96 C. A. D. 882. In that case the irrigation district had in a warehouse, a certain amount of grain that had been taken as rental for tax deeded lands held by the district. The county assessed the grain, the district applied to the Board of Supervisors to cancel the assessment, which was refused, and an application was made to the Court for an order compelling the cancellation of the assessment. The assessment was cancelled on the ground that the district owned no property in any proprietary sense but wholly in a governmental sense and was not subject to taxation.

Now the law in California is no different today than it has always been. Our Courts have simply told us, what it has long suggested, what the law is, in relation to the nature of an irrigation district and that is, that it being purely a creature of the state for state purposes, all the functions of such a district are governmental.

Congress has stated that the Court shall not by any order or decree in the proceeding or otherwise interfere with any of the political or governmental powers

of petitioner. If all of the powers and functions of the petitioner are governmental then it would seem too clear for argument that the Court could make no valid order or decree in these proceedings.

It may be argued that no order or decree contemplated in these proceedings would *interfere* with any of the functions of the district. The slightest reflection demonstrates that such is not the case. One of the functions of the district is to borrow money and issue bonds. Another function enjoined by law and for the enforcement of which mandamus will lie is the levying of assessments to pay the bonds in full according to their terms. Whereas, now mandamus will lie to require the levy of such an assessment, after the order in this proceeding is final, an injunction will lie to prohibit such an assessment. The whole purpose of the proceeding is to change the fiscal affairs of the district. After that change has been made the district will have no power to proceed on the old basis but will be required to proceed upon the new basis.

In the *Bekins* case Mr. Chief Justice Hughes in referring to the *Ashton* case said,

> "* * * the court considered that the provisions of Chapter IX authorizing the bankruptcy court to entertain proceedings for the 'readjustment of the debts' of 'political subdivisions' of a State 'might materially restrict its control over its fiscal affairs', and was therefore invalid; that if obligations of States or their political subdivisions might be subjected to the *interference* contemplated by Chapter IX they would no longer be 'free to manage their own affairs'." (Italics supplied.)

Now, we have the *Bekins* case overruling the *Ashton* case or finding something in the new act that saves the governmental or sovereign functions of the petitioner from the effects of the new act and we have our own state Court holding flatly and unequivocally that every function of the irrigation district is a governmental function and that it owns no property of its own but the property which stands in its name is the property of the state and is used for governmental purposes and impressed with a trust for that purpose and is neither subject to execution nor taxation and we find the act under which these proceedings are pending expressly prohibiting the Court from making any order or decree that will interfere with the political or governmental functions of petitioner and we find that no order or decree could be made that would not interfere with one or more of these governmental functions. So it would appear that there is only one possible basis left upon which the Court could exercise any jurisdiction in these proceedings and that is for the Court to take the position that the Federal Court is not bound by the State Court decisions and that actually these great sovereign functions of taxation which are exercised by the petitioner and which will be directly affected by the decree in this proceeding and will have to be exercised in the future in accordance with such decree are, after all, not governmental at all but are in the nature of private functions. Prior to the *Tompkins* case (*Tompkins v. Erie Railroad Company,* 304 U. S. 64), the Court might, upon one theory, have done that, but the Supreme Court in the *Tompkins* case held that on questions of general or common law

United States Courts are bound by the decisions of the State. In the *Tompkins* case the Court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 401, 37 L. ed. 772, 786, 13 S. Ct. 914, against ignoring the Ohio common law of fellow servant liability: 'I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the

> doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State, and, to that extent, a denial of its independence.' "

Section 34 of the Judicial Code, Title 28, Section 725 U. S. C. A. provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Of course it is true here we are not dealing with an action at common law but we are dealing with one dependent purely upon statute. The irrigation district is a creature of statute and the highest Court of the state that brought the district into existence, has interpreted its charter. That interpretation is laid beside the act of Congress and by that act the district is apparently excluded from its operation.

It has been a general rule of construction since the earliest time that the United States Courts will follow the State Court in a construction of a state statute or a state constitutional provision.

In *Town of South Ottawa v. Perkins,* 94 U. S. 260, 267, the Court said:

> "And this court has always held that the laws of the States are to receive their authoritative construction from the State Courts, except where the Federal Constitution and laws are concerned; and the State Constitutions, in like manner, are to be construed as the State Courts construe them. This has been so often laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities."

The recent California Supreme Court decisions above cited, are but crystalizations, as it were, of the older cases on the same points. Those cases are reviewed to some extent in the *Anderson-Cottonwood* case and it would seem that even in the absence of the *Tompkins* case the United States Courts would be bound by the state decisions as to the nature of an irrigation district. If it is in the nature of a statutory construction then the Court would be bound by the decision and since the *Tompkins* case, if the nature of such a district should be determined upon what is referred to as general law, the United States Courts would also be bound by the State Court decisions.

The position above discussed is greatly strengthened by Subdivision (i) of Section 83 where it is stated:

> "Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any municipality or any political subdivision of or in such State in the exercise of its political or governmental powers, including expenditures therefor."

Now, there are just two ways, with which we are familiar, by which the state may control anything. First, is by legislation and second is by judicial construction. In these proceedings we have pleaded another action pending under a state law. The legislature of the state passed what is referred to as the Irrigation District Refinancing Act. (1937 Stats. p. 92.) That act sets up machinery for accomplishing substantially the same thing that the bankruptcy statute purports to authorize. This district proceeded under that statute and the action is still pending. That statute has not been repealed. So the legislature has itself stepped in and set up procedure for accomplishing a similar purpose and to that extent has undertaken the control of these agencies. That subject, however, we will discuss under another heading. The Courts of the state have determined that the functions of an irrigation district are exclusively governmental. If those decisions were perfectly new and actually inconsistent with prior decisions, still under the act under which this proceeding is prosecuted the interpretation of the State Courts would prevail, because, among other reasons, Congress has expressly said that nothing contained in the chapter "shall be construed to limit or impair the power of the state to control by legislation *or otherwise.*" (Italics supplied.)

Since Congress itself has expressly provided that the Court is without power to make any order or decree interferring with the political or governmental powers of the petitioner it would seem that the Court was entirely without jurisdiction to make any order or decree in these proceedings.

Apparently this same point was raised in the case of *George E. W. Luehrmann, et. al. v. Drainage District No. 7 of Poinsett County, Arkansas,* decided June 13, 1939, by the Circuit Court of Appeals for the Eighth Circuit (not reported at time this brief is written.) In that case the Court said:

> "A former Act (May 24, 1934) permitting municipal corporations and other political subdivisions of states, unable to pay their debts as they mature, to resort to the federal courts of bankruptcy to effect readjustment of obligations, was before the Supreme Court in Ashton v. Cameron County Water Improvement District No. 1, 298 U. S. 573. It was there held that the power claimed in support of the Act, as applied to the district organized to permit water for irrigation and domestic purposes, having power to sue and be sued, issue bonds, and levy and collect taxes, was unconstitutional, as restricting the states in the control of their fiscal affairs. The appellant district there was held to be a political subdivision of the state.
>
> The Act of August 16, 1937, under which this proceeding was brought, undertakes to meet the constitutional weakness of the former Act by the following provision:
>
>> 'That if any provision of this chapter, or the application thereof to any such taxing agency or district or class thereof or to any circumstance, is held invalid, the remainder of the chapter, or the application of such provision to any other or different taxing agency or district or class thereof or to any other or different circumstances, shall not be affected by such holding.'
>>
>> (11 U. S. C. A. 1222, 1223, sec. 401.)

In Drainage District No. 2 of Crittenden County, Arkansas v. Mercantile-Commerce Bank & Trust Company, 69 F. (2) 138, this court held that an Arkansas Drainage District is *not a governmental agency* as respects the question of whether the district is subject to equity jurisdiction. This ruling is based upon the decisions of the Supreme Court of Arkansas holding that drainage districts are quasi-public corporations which are not political or civil divisions of the state like counties and municipal corporations created to aid in the general administration of the government. They are not created for political purposes, nor for the administration of the government. *Appellants do not contend* that the petitioner falls within the limitation upon the power springing from this amendment to the Bankruptcy Act, which limitation was declared in the Ashton case * * * It appears further that unless and until that composition is effected, the district is hopelessly insolvent, and that the Act of August 16, 1937 is valid as applied to this drainage district, *which is not a governmental agency.*" (Italics supplied.)

SECOND PROPOSITION: THERE IS ANOTHER ACTION PENDING IN THE STATE COURTS OF CALIFORNIA UPON THE SAME IDENTICAL CAUSE OF ACTION AND DEMANDING SUBSTANTIALLY THE SAME RELIEF, AND THAT THAT ACTION WAS COMMENCED AND PENDING UNDER STATE LAW PRIOR TO THE PASSING OF CHAPTER X OF THE BANKRUPTCY ACT UPON WHICH THIS PROCEEDING WAS PROSECUTED.

Assignment of error No. 29 is as follows:

"The court erred in not holding this proceeding barred because there was and now is a proceeding

> by petitioner pending under California Statutes of 1937, Chapter 24, for the same relief asked for herein, and which said statute is a bankruptcy statute." (Tr. p. 347.)

We are very serious in presenting this point as we feel confident that the pending action in the State Court is entirely fatal to the prosecution of this action here.

In March, 1937, there was passed by the California Legislature as an urgency measure, which took effect upon its passage, an act designated "Irrigation District Refinancing Act" (1937 Stat. p. 92). (Said act being set out in the appendix, p. 1.)

Briefly that act provides that any irrigation district being unable to pay its debts as they mature, such debts may be liquidated, refinanced or readjusted as therein provided. Such a proceeding is initiated by the Board of Directors of the district who shall adopt a plan. The plan must be concurred in by two-thirds in principal amount of the holders of each class of security effected thereby. The plan shall be presented to the California Districts Securities Commission and if found to be fair and equitable to the creditors the Commission shall approve the same and the Board of Directors is then authorized to file in the Superior Court in the county in which the district or the major part thereof is located, a verified petition stating that the district is unable to meet such obligations as they mature; that it desires to effect the plan adopted and that it has been accepted by a sufficient number of

creditors, and the district desires to avail itself of the act. The act provides that after the petition is filed the plan shall temporarily be in effect and that the filing of the petition shall automatically enjoin and stay, pending final determination of the proceedings as therein set forth, the commencement or continuance of proceedings or suit against the district or any officer thereof and shall enjoin and stay the enforcement of any lien or the levy of assessments except as is consistent with and in furtherance of the plan and that the Court in which the petition is filed shall have *exclusive jurisdiction* with respect to all suits, actions and proceedings against the district on account of the indebtedness effected.

It is then provided in the act that 90 days' notice of hearing be given and that thirty days' notice be personally served upon all known holders of bonds and warrants affected by the plan and at any time prior to the hearing any creditor affected by the plan may file an answer; that changes or modifications may be made, and the Court, if it finds the plan to be fair and equitable and that it complies with the provisions of the act and has been accepted in writing by the required number of creditors and the offer of acceptance are in good faith and that the district is authorized to take the necessary action to carry out the plan, shall make an interlocutory judgment approving the plan.

The case is then continued for the purpose of determining the value of the evidences of indebtedness which value will be fixed by a jury in the nature of condemnation proceeding.

We have not attempted of course to make any complete or comprehensive analysis of the state refinancing act. We only point out a few portions of the act for the purpose of showing that a proceeding under that act is necessarily in the nature of an insolvency proceeding. It cannot be otherwise regardless of what it may be called. A proceeding under that act can only be initiated when the district has been in default for not less than three years or unable to pay its debts as they mature.

There is just one other provision of the act to which we wish to particularly direct the Court's attention. That is Section 19.

Section 19 of the act has a rather startling legislative declaration which shows how completely the State Court has and maintains jurisdiction. We quote the following excerpt from Section 19:

> "In the event that said petition for liquidation, refinancing or readjustment is dismissed, or that any of the provisions hereof for confirmation of the plan or acquisition of the bonds or warrants of the nonaccepting holders shall be declared invalid, such dismissal or declaration shall not affect the effectiveness of the plan with respect to the district or holders of bonds or warrants accepting the same."

In other words, by this section it appears that the legislature intended that when a plan has been adopted and has been accepted by the requisite number of creditors that no matter what may happen thereafter in that proceeding the plan is in effect and both the dis-

trict and the accepting creditors are bound by it. If that be the case, then the so-called dismissal by the district has not changed the situation in the least, even if it be conceded to have been a proper dismissal. In addition to that, the whole proceeding is determined in the State Court once that Court has acquired jurisdiction. And still that is not all. When the matter is finally terminated in the State Court, no matter by what method, the plan has been fully consummated as far as the district and accepting creditors are concerned.

It will be recalled that the petition of the district under the state act was filed in the State Court at Riverside in April, 1937 (Tr. p. 148), and the bankruptcy act under which the district is now attempting to proceed in this Court was not passed by the Congress until August of the same year. These dates are all important.

These appellants took the position at the time the action was filed in the State Court and has continued to hold that position that the state act is unconstitutional, but neither the appellee nor the Court in which the action was pending has agreed with respondents in that respect, and the petitioner and the Court, over the protest of the respondents, continued to the point where judgment was ordered in favor of the petitioner. (Tr. p. 148.) Of course the very strong presumption is that the act is constitutional, and the constitutional question cannot be here discussed as it is entirely collateral to this proceeding.

It cannot be argued that the State Court had not yet acquired jurisdiction at the time the federal act was passed. A demurrer to the petition in the State Court was filed in May, 1937, and was argued and overruled by the Court on or about the 7th of June, 1937. The primary point raised by the demurrer was the constitutionality of the act. At the same time the demurrer was presented the respondents presented a motion to strike the petition from the files on the ground that the Court was without jurisdiction for the reason that the state act was unconstitutional. That motion was denied. Some of the respondents here had certain actions pending against the district in the State Courts at the time the petition in the State Court was filed (Tr. pp. 299-307), and when that petition was filed the Court refused to go further in those actions because of the restraining provisions contained in Section 5 of the state act.

So it is clear that if the Court did not assume jurisdiction at the moment the petition was filed, which is no doubt the case, it certainly did assume and exercise jurisdiction under the state act and under the petition filed pursuant thereto several months before the passage of the bankruptcy act here invoked.

It is also extremely interesting to note that neither the petitioner (respondent here) nor the State Court seemed to regard the federal act as in any manner affecting the right or jurisdiction of the State Court to proceed. The federal act was passed in August, 1937. Notwithstanding that act, the petitioner brought its state action under the state act to trial in Novem-

ber, 1937, and several days of trial and argument took place (see Pet. Ex. 1, Tr. p. 150), and it was as late as April 23, 1938, that the State Court ordered judgment entered in the state action under the state act as prayed for by the petitioner. It was not until the Supreme Court of the United States had passed upon the new bankruptcy act that petitioner decided to abandon the state proceeding and go to the Bankruptcy Court. That cannot be done. The petitioner elected to proceed under the state act in the State Court and it must stay with that proceeding at least until there is a finality to that proceeding. That point has not been reached.

It will be recalled that these respondents were brought into the Bankruptcy Court under Chapter IX of the bankruptcy act back in 1935 (Tr. p. 295) and the action was tried, over the protest of these respondents. After Chapter IX was held unconstitutional by the Supreme Court the District Court dismissed that proceeding. (Tr. p. 298.) Then the petitioner went into the State Court and these respondents were again forced to defend themselves in a long tedious proceeding. Now they are asked to abandon that proceeding and go back to the Bankruptcy Court to do it all over again.

After an action has been tried in the State Court it cannot be dismissed by the plaintiff without the consent of the defendant. (C.C.P. Sec. 581.)

If the State Court had jurisdiction in April, or June, or November, 1937, it still has jurisdiction. Nothing has happened in the meantime to change that situation. The respondents did not raise the question

of jurisdiction in the state as between the State Court and the Federal Court based upon the Bankruptcy Act for the simple reason that the point would not have been well taken. For several months prior to the trial of the state action Chapter X of the Bankruptcy Act was on the books. If the passing of the bankruptcy statute superseded the state act concerning an action that was then pending it would have been a conclusive defense in the State Court, but that is not the case. The law seems to be well settled that where the proceeding is pending under a state act at or prior to the time of the passage of the Bankruptcy Statute, the State Court continues to have jurisdiction under the state act until that proceeding is finally determined. No new proceeding can be commenced in the State Court but the pending proceeding is unaffected. If that is the law, and it clearly seems to be, then for the District Court to proceed in this proceeding meant that two courts in two separate jurisdictions were proceeding at the same time to occupy the same field in administering the same estate. It would seem to require no citation of authorities or no extended argument to demonstrate that such a situation could not be permitted to exist.

If it should be considered that both the District Court and the State Court had concurrent jurisdiction then the law is perfectly well settled that the moving party is put to his election as to which Court's jurisdiction he will invoke and the one first invoked has exclusive jurisdiction from then on. (15 C. J. 1131.) The situation that exists here, however, is not one of concurrent jurisdiction but one in which the

Federal Court had no jurisdiction over those matters that were pending in the State Court for a similar purpose at the time the Bankruptcy Act was passed. If the act under which the State Court is acting is constitutional, then clearly the State Court at Riverside had and still has jurisdiction of that proceeding. The State Court passed upon the constitutionality of the act and held the act to be valid. This Court will not go into a consideration of that question as such consideration would be wholly collateral to the present proceeding, but this Court will rest upon the presumption, first, that the act is constitutional, and secondly, that the order of the State Court holding it to be constitutional is a valid order.

A STATE PROCEEDING PENDING UNDER AN INSOLVENCY LAW OF THE STATE AT THE TIME OF THE PASSAGE OF A BANKRUPTCY ACT IS UNAFFECTED BY THE PASSAGE OF SUCH ACT.

The foregoing proposition seems to have been uniformly held to be the law. While there are not a great number of authorities on the point, one way or the other, after a considerable search we have found none denying the above proposition, but we find a number of authorities supporting it.

Several authorities are collected in a note in 45 L. R. A., at page 187, supporting the following statements of the author of that note, where he says:

> "Proceedings under State insolvency laws pending at the time of the passage of a bankrupt act are not affected by the latter act."

Mr. Justice Story is quoted from in the case of *Larrabee v. Talbott,* 5 Gill (Maryland) 426, 46 Amer. Dec. 637, as follows:

"That as soon as the bankrupt act went into operation, in February, 1842, it ipso facto suspended all action on future cases, arising under the state insolvent law, where the insolvent persons were within the purview of the bankrupt act. I say future cases, because very different consideration would or might apply, where proceedings under any state insolvent laws were commenced, and were in progress before the bankrupt act went into operation, * * *"

In *Martin v. Berry,* 37 Cal. 208, 211; the Court said:

"If a State Court has acquired jurisdiction under a state law of a case in insolvency, and is engaged in settling the debts and distributing the assets of the insolvent before or at the date at which the Act of Congress upon the same subject takes effect, the State Court may, nevertheless, proceed with the case to its final conclusion, and its action in the matter will be as valid as if no law upon the subject had been passed by Congress. This question arose in the case of Judd v. Ives, 4 Metcalf, 401, and was determined as just stated."

In *Minot v. Thacher,* 7 Metcalf (Mass.) 348, 41 Amer. Dec. 444, the Court said:

"The proceedings under the insolvent law having been instituted before the bankrupt act was enacted, they could not be superseded by the application, under the bankrupt law. * * *"

In *Greensfeld Bros. v. Brownell* (N. M. 1904), 76 Pac. 310, 312, referring to Bankruptcy Act of 1898:

"* * * It was only intended to act in the future, and to take cognizance of such acts of bankruptcy as were committed after its passage. As to acts

> committed before its passage, there could be no collision between the bankrupt laws and the laws of this territory which we are now considering, because the bankrupt law was not, and could not under its express terms be, operative as to acts committed before its passage. We can see no reason for not permitting proceedings brought under the territorial statutes to proceed, * * * Unless this construction is held, it is obvious that the bankruptcy law might act as a shield * * *" etc.

See, also:

Day v. Bardwell, 97 Mass. 246, 255.

In *In re Bruss-Ritter Co.,* 90 Fed. 651, the Court had before it an involuntary bankruptcy proceeding under the Act of 1898. The act provided for a certain day on which it would take effect, and also provided that involuntary proceedings could not be commenced within four months after that date. During that four months' period an insolvency proceeding was commenced in the State Court. A motion was made to dismiss the bankruptcy proceeding on the ground that an action was pending in the State Court when the Bankruptcy Act took effect. The Court seems clearly to recognize the rule, but held that while an involuntary proceeding could not be filed within that four months' period, still the act actually took effect at the earlier date and prior to the commencement of the action in the State Court. The Court necessarily denied the motion, but it was clearly indicated that had the state proceeding been pending prior to the effective date of the Bankruptcy Act or prior to its passage, then the motion would have been good.

In the nature of things this question would not often arise, but as above indicated, so far as we have been able to find, every time the question has arisen it has been decided as above indicated, namely, that when the proceeding under an insolvency act of the state is pending at the time of the passage of the Bankruptcy Act that proceeding is unaffected and the Court in which it is pending has jurisdiction to carry that proceeding on to conclusion. If that be the case then the Federal Court did not have jurisdiction of the same matter at the same time.

That action is still pending in the State Courts. The appellants are unwilling to have that action dismissed and has appealed from an order entered by the State Court dismissing the action without the appellants' consent. Since the trial Court does not seem to have had jurisdiction while that jurisdiction is in the State Court, we suggest that this proceeding ought to be now ordered dismissed.

We now pass to the question of *res judicata.*

THIRD PROPOSITION: THE CAUSE IS RES JUDICATA.

Assignment of Error No. 3 is as follows:

> "The court erred in finding that none of the matters alleged in the present petition are res judicata, and in finding that this court had power and jurisdiction to consider and adjudicate all of the matters in this proceeding."

We have two federal bankruptcy statutes for relief of Irrigation Districts, Chapter IX and Chapter X, now renumbered Chapter IX.

This district came into Court under old Chapter IX and presented a plan. (Tr. pp. 149, 295.) The case went to trial and a judgment, which is now final, was renedered, dismissing the cause. This proceeding is under Chapter X, and has presented the same plan with the same parties and demanding the same relief. The only difference in the two plans is that under the present plan the district reserves the right to pay in cash or in bonds. This difference in the plan is inconsequential, particularly because if there is any difference it is a further derogation of appellants' rights. If the plan granted appellants greater rights, it could possibly be said that the difference was of consequence.

Chapter X (now Chapter IX) does not repeal old Chapter IX, stating in Section 83h that "This Chapter shall not be construed so as to modify or repeal any prior existing statute relating to the refinancing or readjustment of indebtedness of municipalities, political subdivisions, or districts", stating further that the "initiation" of proceedings or filing a petition under Section 80 shall not constitute a bar to a new proceeding under Section 81.

This does not say that a judgment under Section 80 is not to be construed as res judicata.

We have two decisions by the Supreme Court, the *Ashton* decision, declared old Chapter IX unconstitutional. The decision in *U. S. v. Bekins,* 304 U. S. 27, declared Chapter X constitutional.

The rule of decision is that the Court declares an act void or valid, as applied to a particular case. Old

Chapter IX is still in existence if it can be applied constitutionally; Congress has specifically preserved its existence.

The differences between Chapter IX and Chapter X are not of substance. (See Cal. Law Reviews July, 1938, p. 624.)

The *Bekins* decision did not specifically overrule the *Ashton* decision. It is apparent, however, that the *Ashton* decision may be regarded as flatly overruled.

That brings to attention the first point. *If the Ashton decision is overruled and old Chapter IX is constitutional then we have a final judgment in the Palo Verde case.*

The second point, equally good, is that *however it may be regarded as to whether the Ashton case was reversed we have a final judgment in the Palo Verde case.* The very things, and each and every thing that the Palo Verde District now seeks to do in its present cause, has been declared in the prior cause to be an unconstitutional infringement of the rights of the respondents. Considering these two points, we will first respectfully direct the Court's attention to the proposition that the *Ashton* case stands overruled.

THE ASHTON CASE IS OVERRULED BY THE BEKINS CASE.

It cannot be seriously argued that there is a material difference between Chapter IX and Chapter X of the Bankruptcy Act, so far as their applicability to any particular agency is concerned.

The similarity of the two statutes is particularly noticeable in this case when we consider that the

same identical plan, with an immaterial change above noted, is used under one chapter as was attempted to be used under the other.

In the *Bekins* (304 U. S. 27-54) case, supra, the Court quotes from the House Committee Report and says (50):

> "Compositions are approvable only when the districts or agencies file voluntary proceedings in Courts of Bankruptcy, accompanied by plans approved by 51 percent of all the creditors of the district or agency, and by evidence of good faith." (This was all required under Chapter IX.) "Each proceeding is subject to ample notice to creditors" (so were they under Chapter IX), "thorough hearings" (also under Chapter IX), "complete investigations" (also under Chapter IX), "and appeals from interlocutory and final decrees". (Also under Chapter IX.) "The plan of composition cannot be confirmed unless accepted in writing by creditors holding at least 66⅔ percent of the aggregate amount of the indebtedness of the petitioning district or taxing agency" (neither could it be under Chapter IX) "and unless the Judge is satisfied that the taxing district is authorized by law to carry out the plan" (also under Chapter IX), "and until a specific finding by the court that the plan of composition is fair, equitable, and for the best interest of the creditor" (the same is true under Chapter IX) * * *
>
> (51) "The bill here recommended for passage expressly avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties." (It was the same under Chapter IX.) "No interference with the fiscal or governmental affairs of

a political subdivision is permitted.'' (Such interference with fiscal and governmental affairs is not only permitted but required if the plan is to become effective, but regardless of that, Chapter X is in no manner different in that respect than was Chapter IX.) ''The taxing agency itself is the only instrumentality which can seek the benefits of the proposed legislation.'' (So it was under Chapter IX.) ''No involuntary proceedings are allowable'' (neither were they under Chapter IX), ''and no control or jurisdiction over that property and those revenues of the petitioning agency necessary for essential governmental purposes is conferred by the bill.'' (Neither was it under Chapter IX.) * * *

* * * ''It is the opinion of the Committee that the present bill removes the objections to the unconstitutional statute. * * *''

The Court said: ''We are of the opinion that the Committee's points are well taken and that Chapter X is a valid enactment. The statute is carefully drawn so as not to impinge upon the sovereignty of the State. The State retains control of its fiscal affairs.''

The Court points out no part of Chapter X which distinguished it from Chapter IX in so far as interference with State affairs is concerned. Therefore it seems clear that the Court is not basing its decision upon the differences of the two statutes but upon the principles applicable to one of them as well as to the other.

The field of inquiry is clearly stated by the Court in the *Bekins* case as follows:

> "We are thus brought to the inquiry whether the exercise of the federal bankruptcy power in dealing with a composition of the debts of an irrigation district, upon its voluntary application and with the State's consent, must be deemed to be an unconstitutional interference with the essential independence of the State as preserved by the Constitution."

The Court then answers that inquiry in one sentence above quoted: "The statute is carefully drawn so as not to impinge upon the sovereignty of the State."

Now let us turn back to the *Ashton* case and see what was there held and then further examine the holdings in the *Bekins* case.

In the *Ashton* case, supra, (298 U. S. 513-543), the Court said:

> "* * * the Texas Legislature declared that municipalities, political subdivisions, taxing districts, etc., might proceed under the Act of Congress approved May 24, 1934." (527)
>
> "If federal bankruptcy laws can be extended to respondent why not to the state?" (530)
>
> "If voluntary proceedings may be permitted, so may involuntary ones, subject, of course, to any inhibition of the Eleventh Amendment."
>
> "If the State were proceeding under a statute like the present one, with terms broad enough to include her, apparently the problem would not be materially different."
>
> "If obligations of States or their political subdivisions may be subjected to the interference here

attempted, they are no longer free to manage their own affairs. * * *'' (531)

"And really the sovereignty of the State, so often declared necessary to the federal system, does not exist."

"The Constitution was careful to provide that 'No State shall pass any law impairing the obligation of contracts'. This she may not do under the form of a bankruptcy act or otherwise."

"Nor do we think she can accomplish the same end by granting any permission necessary to enable Congress so to do."

"Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted."

"The sovereignty of the State essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation."

"Like any sovereignty, a State may voluntarily consent to be sued; may permit actions against her political subdivisions to enforce their obligations. Such proceedings against these subdivisions have often been entertained in federal courts. But nothing in this tends to support the view that the Federal Government, acting under the bankruptcy clause, may impose its will and impair State powers—pass laws inconsistent with the idea of sovereignty."

Now when we turn to the *Bekins* case after presenting certain authority and argument the Court states (53):

"In the instant case we have cooperation to provide a remedy for a serious condition in which the States alone were unable to afford relief. Improvement districts, such as the petitioner, were in distress. Economic disaster had made it impossible for them to meet their obligations. As the owners of property within the boundaries of the district could not pay adequate assessments, (54) the power of taxation was useless. The creditors of the District were helpless. The natural and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation. The bankruptcy power is competent to give relief to debtors in such a plight, and if there is any obstacle to its exercise in the case of the district organized under state law it lies in the right of the State to oppose Federal interference. The state steps in to remove that obstacle. The state acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agencies which the State itself is powerless to rescue. Through its cooperation with the national government the needed relief is given. We see no ground for the conclusion that the Federal Constitution, in the interest of state sovereignty, has reduced both sovereigns to helplessness in such a case. * * *

(49) In Ashton v. Cameron County * * * the court considered that the provisions of Chapter IX (50) authorizing the bankruptcy court to entertain proceedings for the 'readjustment of the debts' of 'political subdivisions' of a state 'might

> materially restrict its control over its fiscal affairs,' and was therefore invalid; that if obligations of States or their political subdivisions might be subjected to the interference contemplated by Chapter IX, they would no longer be 'free to manage their own affairs'."
>
> "In enacting Chapter X the Congress was especially solicitous to afford no grounds for this objection."

The Court neither points out the difference between the two statutes that saves Chapter X as against the unconstitutionality of Chapter IX nor does it state in so many words that Congress did succeed by its solicitation in affording no grounds for the objections found in the *Ashton* case.

The whole decision in the *Bekins* case like that in the *Ashton* case is placed upon principle and the principles upon which the Court held Chapter IX unconstitutional are completely reversed and overruled in the *Bekins* case.

There seems to be but one possible difference between the two statutes upon which the Court might hold one valid and the other void. That difference, hereinabove discussed under our second proposition, is in the word "petitioner" found in Section 83c and the words "taxing district" found in subdivision (c) 11 of the old Section 80. "Taxing District" was defined by the void act to be a political subdivision, whereas the "petitioner" under the new act might be such an agency as would not be a political subdivision or governmental agent at all. That difference, how-

ever, does not in any way effect the principles discussed by the Court. The Court does not refer to this difference at all but decides the *Bekins* case wholly upon principle and exactly opposite to the same principles as apply to Chapter IX. It therefore appears that the *Ashton* case has been overruled, and the effect would seem to be to leave old Chapter IX upon the books as a valid enactment.

That the *Ashton* case is overruled was concluded by the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Supreme Forest Woodmen Circle et al. v. City of Belton, Texas,* 100 F. (2d) 655 at 657, where the Court said, referring to the *Bekins* decision:

> "It is the view of the writer that this opinion does not attempt to distinguish, but completely reverses that in the Ashton Case."

Indeed, counsel for the appellee conceded at the argument on his motion to dismiss this appeal in this Court that the *Ashton* case was overruled.

If the *Ashton* case is overruled then the old Chapter IX was valid and a decision under it, while it might be erroneous, is nevertheless final and binding.

> "If the decision that a statute is unconstitutional is subsequently reversed or overruled, the statute will be treated as valid and effective from the date of its enactment."
>
> 12 *C. J.* 801.

We now turn to the second point under this heading, namely, that even if the *Ashton* case be not re-

garded as overruled, still, we find here a proceeding demanding the same relief from the same parties in the same way as was sought but denied in a former proceeding, in which the judgment, though possibly erroneous, is long since final.

This is a different situation than was presented in the *Frasier-Lemke* cases where under a new petition the debtor seeks to do different things than he sought to do under the old petition.

Here we have the debtor seeking to do the same things under this statute which it was adjudged under the old statute it could not do.

THE DOCTRINE OF RES JUDICATA OR ESTOPPEL BY FORMER JUDGMENT.

Mr. Justice Harlan, in *Southern Pacific Railroad Company v. United States,* 168 U. S. 1, 48, 18 S. Ct. 18, said:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very objects for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial

> determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

See also

34 *C. J.* 744, and notes there set forth.

The judgment here is a final judgment between these parties declaring that that which was sought to be done could not be done.

So, while judgments rendered under unconstitutional laws are voidable, the right to have such a judgment set aside may be waived by voluntary action on the part of the defendant. (12 C. J. 801.) This really means that a final judgment cannot be questioned as between the parties.

> "A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action * * * and cannot be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon either the same or a different cause of action."

34 *C. J.* 868.

This is the rule, even though the second suit has a different object and is not technically for the same cause as the first action, but is so related to it that some matters essential to recovery in the second action were determined in the first. (34 *C. J.* 817.)

> "A party cannot escape the bar of a judgment against him by bringing a new suit on the same cause of action, but in a different form of action or proceeding."
>
> 34 *C. J.* 813.

> "It has been held that a proper test on an issue of identity of causes of action is to inquire whether the judgment sought will be inconsistent with the prior judgment; if such inconsistency is not shown, the prior judgment is not a bar."
>
> 34 *C. J.* 805.

THE NEW STATUTE HAS NO EFFECT ON THE OLD JUDGMENT.

The general rule is that

> "The legislature may not, under the guise of an act affecting remedies, annul, set aside, or impair final judgments obtained before the passage of the act."
>
> 12 *C. J.* 984;
>
> *McCullough v. Virginia,* 172 U. S. 102, 18 S. Ct. 134.

> "The policy of the law or constitutional principle involved very clearly is that rights of property, once vested * * * by judicial decision then finally between the parties shall not afterwards be disturbed or the controversy opened by mere legislative enactment."
>
> *Lancaster v. Barr,* 25 Wis. 560, 562.

The vested right as a ground of defense is protected from being destroyed by an act of the legislature. (12 *C. J.* 973.)

Of course, in California a judgment is a contract. *Scarborough v. Dugan,* 10 Cal. 305, and under the new rule of interpretation adopted by the United States Supreme Court in *Erie Railroad Company v. Tompkins,* 58 S. Ct. 817, the doctrine of *Swift v. Tyson* is disapproved and in any case, except matters governed by the Federal Constitution or acts of Congress, the substantive law will be applied as found in the law of the State whether declared by statute or by decision of its highest Court. This applies not only to law cases, but to equity cases as well.

An amendment of an unconstitutional statute, making it constitutional does not have a retroactive effect so as to affect the validity of a judgment determining such statute unconstitutional rendered before the amendment, and such a judgment will not be reversed upon appeal by reason of such amendment. *(Frost v. City of Los Angeles,* 181 Cal. 22, 183 Pac. 342.

In this case the Court said:

> "* * * the answer is that amendments to the law do not operate upon an existing suit in a case like the present, nor have retroactive effect so as to affect the validity of a judgment rendered before the new law came into existence."

It is said in some of the cases that for a judgment to be successfully pleaded as an estoppel or *res judicata* that judgment must have been rendered "on the

merits". That term must not be confused with "facts". A judgment may be based wholly on the law as applied to facts pleaded and without any evidence whatever and yet be a judgment "on the merits".

In note 67(a), 34 *C. J.* 776, it is stated:

> "Other Statements of Rule.—The term 'upon the merits,' as used in the rule that no judgment can be pleaded as an estoppel or res judicata unless it is pronounced by decision of the court upon the merits and is the conclusion of the court upon the facts after final hearing, means on a matter of substance, as distinguished from matter of form, the real or substantial grounds of action or defense, in contradiction to technical or collateral matter raised in the course of the suit, and 'after final hearing' means after the cause is finally submitted to the court for decision. Neil v. Hyde, 32 Ida. 576, 186 P. 710. (2) 'As a technical legal form, "merits" has been defined in law dictionaries as "matter of substance in law, as distinguished from matter of form" (Black; Burrill), and as "the real or substantial grounds of action or defense, in contradistinction to some technical or collateral matter raised in the course of the suit." (Anderson; Abbott.) "A judgment is 'upon the merits' when it amounts to a declaration of the law as to the respective rights and duties of the parties, based upon the ultimate fact or state of facts disclosed by the pleadings and evidence, and upon which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions." 2 Black Judg., s. 694.' Ordway v. Boston etc. R.

Co., 69 N. H. 429, 430, 45 A. 243 (quote Wolfe v. Georgia R. etc. Co., 6 Ga. A. 410, 412, 65 S. E. 62)."

Bouvier refers to a New York case and says:

"In the New York Code of Procedure, it has been held to mean 'the strict legal rights of the parties as contra-distinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the *discretion* or *favor* of the court.' St. Johns v. West, 4 How. Pr. (N. Y.) 332."

FOURTH PROPOSITION: RECONSTRUCTION FINANCE CORPORATION IS NOT A CREDITOR AFFECTED BY THE PLAN.

Assignments of Error Nos. 6 and 7, are as follows:

"6. The court erred in finding that Reconstruction Finance Corporation owned and held 96% or any other amount of the indebtedness affected by the plan of composition, and in finding that it owns more than 95% or any other amount of each of the issues of bonds mentioned in said petition.

7. The court erred in finding that it is not true that 96% or any of the obligations of petitioner have been paid with funds obtained from Reconstruction Finance Corporation and in finding that it is not true that petitioner is obligated in an amount equal to 24.81% or any percentage of 96% of the obligations of petitioner or any sum less than the whole sum of principal and interest evidenced by the face of said obligations together with interest thereon at the rate of 4 per cent per annum. The court erred in finding that by the contract executed between petitioner and Recon-

struction Finance Corporation, petitioner is obligated to said corporation to the full amount of principal and interest evidenced by the note and bonds held by said corporation, and in finding that said corporation has neither loaned nor advanced any funds to petitioner, and in finding that no amount of obligations held by Reconstruction Finance Corporation has in fact or in legal effect or otherwise been extinguished." (Tr. pp. 341, 342.)

By Section 83 of the Bankruptcy Act the petition shall allege that not less than 51 percentum in amount of the securities *affected by the plan* (excluding however any such securities owned, held or controlled by the petitioner) have accepted it in writing. By the same section it is provided that not less than ten days prior to the time fixed for the hearing any creditor of the petitioner *affected by the plan* may file an answer.

By the same section (subdivision b) it is provided the plan of composition shall not be confirmed until it has been accepted in writing by or on behalf of creditors holding at least two-thirds of the aggregate amount of claims of all classes *affected by the plan.*

In subdivision a of the same section it is provided that "No creditor shall be deemed to be affected by any plan of composition unless the same shall affect his interest materially, * * *"

In Section 82 it is provided that the term "security affected by the plan" means security as to which the rights of the holders are proposed to be adjusted or modified materially by the consummation of the composition agreement.

The term "affected by the plan" of course means adversely affected by the plan.

For convenience in this discussion and with permission of the Court we will refer to the appellee Palo Verde Irrigation District as the district and to Reconstruction Finance Corporation as R. F. C.

Prior to March 1, 1934 the district made application to R. F. C. for a loan, pursuant to the provisions of Section 11 of an Act of the Legislature of California approved May 5, 1917 as amended (Stats. 1933, p. 2394) so far as the district is concerned and pursuant to the terms of the Emergency Farm Mortgage Act of 1933 (Title 43, Section 403, U. S. C. A.) (Appendix p. 80) so far as R. F. C. is concerned. The terms of these two acts are important as we will see in construing the resolutions and agreements between the district and R. F. C.

The loan was approved by R. F. C. by resolution on March 1, 1934. (Tr. pp. 201-223.) The plan set up in that resolution is the same plan brought forward as a plan of composition under an Act of Congress that was not passed until more than three years later and now involved in these proceedings. The plan has never been changed or modified.

The plan called for refunding bonds of the district to represent the amount of the loan and the district election authorizing the loan was held on June 15, 1934. (Tr. p. 223.)

An agreement was entered into between the district and R. F. C. as of August 7, 1934 (Tr. p. 225), and as of the same date a second agreement somewhat dif-

ferent in its terms was entered into between the same parties. (Tr. p. 236.) It was stipulated however that the first agreement dated August 7, and being Petitioner's Exhibit No. 19, was approved or authorized by the district on July 24, preceding. (Tr. p. 225.) Disbursement by R. F. C. was made on the loan on October 31, 1934 (Tr. p. 224), and that at the time of trial R. F. C. had in its possession 96.76% of the old bonds. (Tr. p. 224.)

R. F. C. now claims to be the owner of these old bonds and is therefore a creditor affected by the plan and competent to give its consent to the composition proposed.

The Court will not act blindly upon this important proposition but will look into the whole transaction to see whether or not R. F. C. is first, the owner of the bonds, and secondly, whether or not it is affected by the plan.

It is interesting to note that at the time R. F. C. approved the loan and adopted its resolution on March 1, 1934, there was no bankruptcy law upon this subject. Furthermore there was no bankruptcy law upon the subject when Congress approved that part of the Emergency Farm Mortgage Act of 1933 authorizing R. F. C. to make loans for the purpose of enabling a district to reduce and refinance its outstanding indebtedness where an agreement had been entered into between the applicant and the holders of its outstanding bonds under which the applicant would be able to purchase or refund all or a major proportion of such bonds or other obligations, nor was there any bank-

ruptcy law when the Districts Securities Commission made its order No. 8 approving the proposition for election, that of the issuance of the refunding bonds (Tr. p. 278) and the so-called "Refunding Plan".

After Chapter IX of the Bankruptcy Act had been passed the district and R. F. C. entered into two contracts under date of August 7, 1934. Chapter IX was declared unconstitutional in the *Ashton* case. (*Ashton v. Cameron County Water Improvement District No. 1,* 298 U. S. 513.) At that time the district had pending in the District Court of the United States a petition in bankruptcy, *presenting this same plan,* under Chapter IX which was dismissed, as we have seen, on December 8, 1936. (Tr. p. 149.) Also as we have seen the district then went into the State Courts in April, 1937, under the State Act and presented this same plan supported by this same resolution and these same agreements. Thereafter on August 16, 1937, the act under which these proceedings are pending was approved. In May, 1938, these proceedings were commenced supported by this same plan under this same resolution and these same agreements.

All these facts and circumstances will be taken into account by the Court in considering the instruments constituting the agreement between the parties and likewise the Court will consider the powers of the parties in entering into the agreements, namely, the state law as to the powers of the district and the Emergency Farm Mortgage Act as to the powers of the R. F. C.

We will now briefly examine this resolution and the agreements.

The resolution is found in the transcript commencing at page 201. And in the first paragraph of the preamble, it is recited that the petitioner has applied "for a loan to enable it to reduce and refinance its outstanding indebtedness". Whether this recital were in the resolution or not it would necessarily be read into the resolution because R. F. C. is authorized to make loans in such cases only for the purpose of enabling the applicant to reduce and refinance its outstanding indebtedness. If it still owes the full amount of these old bonds held by R. F. C. it certainly has failed in its purpose.

At page 204 of the transcript it is stated that no loan shall be made hereunder (a) unless all of the old securities shall be thus deposited, or, (b) unless the division chief shall deem that such a large proportion of such securities has been deposited as will satisfactorily accomplish the purposes of the corporation in authorizing the loan. It is then provided that the amount loaned by the corporation shall be sufficient to provide for payment of the amounts of money on account of the deposited securities as follows: 24.81¢ for each dollar of principal amount of such bonds in case the district is unable to secure the deposit of all of such bonds, but shall procure the deposit of such large proportion thereof as shall be required or approved by the division. Since more than 90% of the bonds have been deposited and the corporation actually disbursed on October 31, 1934, it seems to conclusively follow that the division chief was satisfied that a sufficiently large proportion had been deposited to accom-

plish the purposes of the corporation in authorizing the loan.

Subsection b of Section 5 of the Resolution (Tr. p. 208) provides that in the event the division chief shall deem it necessary to keep any or all of the deposited securities alive for a greater or lesser length of time *in order to maintain a parity of rights* as between the holders of the deposited securities and the rights of holders of old securities, or for any other purpose, then the loan may be made directly to the owners' agent and consenting owners. Then, in that event, it is expressly provided that such loan shall be represented by notes of such consenting owners' agents, and the deposited securities shall be pledged as security therefor. There seems to be no evidence that that was ever done. Following on page 209 of the transcript it is provided that the note shall bear 4% interest and the district shall not be a party but if the district pays the interest the corporation will accept the interest payment and give credit to the district for payment of interest for such period on all deposited securities at that time held by the corporation, and that nothing contained in the resolution shall be deemed to limit the right of the corporation to force full payment of interest or principal as on deposited securities it may hold at any time when it may deem it advisable to do so in order to protect its rights as holders of deposited securities against any rights claimed by the holders of old securities that have not been deposited.

Whether this last provision is a valid and binding requirement or not becomes immaterial as it appears

that that procedure was never followed out by the giving of notes and the pledging of securities. It was handled in a different way as we will note.

This resolution which is all important upon this phase of the discussion will be examined in detail by the Court and we will not burden the Court by any minute analysis of the same. It is sufficient to state that it is quite apparent from the resolution that at the time it was entered into or approved there was no thought in the minds of either the corporation or the district that the ownership of these old securities would at any time or in any way or in any manner pass to R. F. C. for the full amount of the old obligations or for any other amount. If the matter was to be handled by a note given by owners' agent then and in that case the old bonds would be deposited with the note as a pledge but that apparently was never done. Now it is claimed that even though that was not done, and even though R. F. C. disbursed to the amount of some 96% of the old security, what it actually did was to purchase the old securities and own them outright. This resolution appears to give no hint that such a transaction was contemplated or might be followed. If R. F. C. had attempted to follow that procedure it is apparent that their acts would have been ultra vires. This, notwithstanding the fact that in the second agreement of August 7, 1934, which is Petitioner's Exhibit No. 20, it is recited that by said resolution it was contemplated (Tr. p. 236) that this indebtedness would be reduced or refinanced by the corporation acquiring the old securities.

The first contract between the district and R. F. C. being Petitioner's Exhibit No. 19 (Tr. p. 225) seems to be entirely in accordance with the resolution of March 1, 1934. We find not a word in that contract to the effect that R. F. C. may go out into the market and buy up and own the old securities. It is all based upon the theory of a loan to the district and a reduction of the district's indebtedness and the execution and delivery by the district of refunding bonds to R. F. C. for the amount of the loan.

We find quite a different situation in the second agreement between the district and R. F. C. under date of August 7, 1934, and being Petitioner's Exhibit No. 20. (Tr. p. 236.) The first agreement is based upon the resolution of March 1st and the subsequent election held in the district on June 4th. If the second agreement is not in accordance with the resolution and the agreement which followed the resolutions, which were approved by the people at an election for that purpose, its validity for any purpose could well be doubted.

In this second resolution we find the proposition advanced for the first time that it was contemplated by the resolution of March 1st that the corporation would make the loan by acquiring the old securities (Tr. p. 236) and thereafter exchanging said old securities for new bonds to be issued by the district. Notwithstanding the fact that this second agreement purports to authorize R. F. C. to acquire and be the owner of the old securities it is expressly provided (Tr. p. 239) that during the time the corporation holds any of the old

securities which have not been refinanced by the delivery of new bonds, the district will levy and collect taxes and assessments in sufficient amount to pay the corporation each a year sum which would yield to the corporation 4% upon the total amount of the disbursement made by it in acquiring such old securities. It is provided that the corporation may require the district to pay any larger sum not exceeding the amount due on the old securities according to their terms but it is very apparent that such contingency is not at all contemplated.

When we consider that this second resolution does not square with the first one or with the resolution upon which the people voted and when we consider that the district itself paid very large sums of public money for the purpose of bringing about this refinancing which of course it simply could not do if it was simply transferring ownership of its outstanding securities from one holder to another, and when we consider that the indebtedness of the district to R. F. C. is not the amount of the old securities but the amount of the loan disbursed it becomes perfectly obvious that this second resolution sheds little light upon the true relation of R. F. C. to the district.

It clearly appears that R. F. C. is holding these bonds in some capacity other than as the absolute owner thereof. If it is holding these bonds as owner it violates its own charter. If the district has paid out sums of money to transfer the ownership from one security holder to another it has committed an *ultra vires* act. The Court is not going to presume that any of these

unlawful things were done. The Court is going to presume that the district and R. F. C. acted lawfully, which they did. The District lawfully expended its money in order to reduce its debt; not surely to effect a mere transfer from one creditor to another, nor to enable such new creditor to "buy its way into Court". R. F. C. authorized the loan for the purpose of reducing the debt, not to keep it the same. The resolution provides that in the event the R. F. C. loans its money to owners' agent and takes agent's notes and the bonds are pledged it may keep the bonds alive for the purpose of bringing about parity[1] between those bonds and the undeposited old securities. Maybe it can do that and maybe it cannot, but it did not because it did not loan to the owners' agents and take their note, so it is apparent that no parity exists.

It may be argued, as it has been many times in these and other similar proceedings, that these are only steps leading to a completed loan, and that R. F. C. in the meantime is the absolute owner of the bonds, but this cannot be in this case for at least two reasons. In the first place, such a procedure is not authorized anywhere in the real contract between the parties, and secondly suppose the loan never is made, then the whole transaction is void as *ultra vires* upon the district under the Act of 1917 as amended and by the R. F. C. under the Emergency Farm Mortgage Act of 1933 as amended. The original bondholders up to some 96% have received their money, have been paid off

1. Parity may and probably does refer to parity of rights between the non-deposited bonds and the R. F. C. "*loan*". There may have been a question whether the new refunding bonds were of parity with the original bonds held by the non-consenting bondholders.

and gone their way. In order to make this a valid transaction which it is, then these bonds are held by R. F. C. in some capacity other than as absolute owner, which at once differentiates R. F. C. from the appellants in this case. The most that can be said of these bonds in possession of R. F. C. is that they are either, in contemplation of law, already cancelled or paid or they are held by R. F. C. in pledge to secure the advances that have already been made prior to the time R. F. C. received the refunding bonds. This latter supposition is probably the correct one, but in no event is R. F. C. the absolute owner. Therefore it is not affected by the plan and cannot vote its consent.

THE CONDUCT OF THE PARTIES SHOWS THE TRANSACTION TO BE A COMPLETED LOAN.

Where the rights of third parties, viz.: these appellants, have attached the conduct of the parties is a relevant part of the transaction.

Particularly applicable here is the rule stated in 1 *Mechem,* Sales (1901), sec. 46, p. 45:

> "In doubtful cases, moreover, these ambiguous contracts are construed most strongly against their framers, if such a construction is necessary to protect the rights of others."

In *Arbuckle Bros. v. Kirkpatrick,* 98 Tenn. 221, 39 S. W. 3 (1897), the Court said (p. 252):

> "In construing such a contract, whenever it affects the rights of others, it will be so construed as to protect such rights, and not to enable the complainants to carry out any double purpose. In view of its uncertainty and contradictory provi-

sions the Court will see that third parties are not prejudiced by its construction."

Always of great weight in the interpretation of the contract is what the parties have done under it. (*Insurance Co. v. Dutcher,* 95 U. S. 269, 273; *Topliff v. Topliff,* 122 U. S. 121, 131; *District of Columbia v. Gallaher,* 124 U. S. 505, 510.

Furthermore, in the execution of the loan transaction itself and the preliminaries thereto, the intent of the parties shows that the loan was to be fully consummated and completed upon the disbursal.

Title 15, Section 15, Title 604(a), U. S. C., provides:

> "No funds shall be disbursed on any commitment or agreement to make a loan or advance hereafter made by the Reconstruction Finance Corporation after the expiration of one year from the date of such commitment or agreement; * * *"

It is obvious therefore that the loan disbursed on October 31, 1934 expired at least within a year from that time. The R. F. C. must have intended therefore that the transaction was complete at that time.

Title 43, Section 403, U. S. C. A., provides that

> "No loan shall be made * * * until an agreement has been entered into between the applicant and the holders of its outstanding bonds or other obligations under which the applicant will be able to purchase or refund all or a major portion of such bonds * * * and under which a substantial reduction will be brought about in the

> amount of the outstanding indebtedness of the applicant."

The conduct of the R. F. C. in making disbursal in October, 1934 shows that the R. F. C. was satisfied that that provision had been complied with.

All of the witnesses including Mr. Wagner referred to the transaction as a loan by the R. F. C. In fact wherever reference is made to the transaction in any of the papers in the case, except in the instructions of the R. F. C. to its agent, we find the reference is to a loan.

Exhibit 19, which is the bona fide agreement with the R. F. C., states that whereas the district has submitted to the electors by an election the proposition "of entering into and carrying out a contract with the R. F. C. for a loan" and recites that the plan has been submitted to the Districts Securities Commission and finally that it is mutually agreed

> "That the Reconstruction Finance Corporation agrees to loan an amount not to exceed $1,039,423 to and for the benefit of said district."

Thus showing that this agreement is made in accordance with the R. F. C. resolution and the election of the people.

Order No. 8 of the Districts Securities Commission approving the refunding plan and issuance of the refunding bonds dated May 4, 1934 (Tr. p. 278) recited:

> "(3) That said refunding bonds be issued to repay the Reconstruction Finance Corporation

> for equal amounts of loans provided by said corporation, for the payment of the said district's present outstanding indebtedness in accordance with Section 11 of the Act * * *''

This clearly shows that the Districts Securities Commission in giving its approval intended that the refunding bonds should be issued to repay dollar for dollar, the amounts of loans provided by the R. F. C. for the payment of the district's present debt.

A resolution of the Board of Directors (Tr. p. 279) recited that in October, 1934 the R. F. C. has authorized a loan to enable the district to reduce its outstanding debt and that an advance from the R. F. C. to the district is about to be made under said loan agreement. This is recited as a preliminary in a resolution for the cancellation of a certain lease, but the important part of the resolution is that it states that the advance is about to be made *to the Palo Verde district.* There also appeared a resolution of the Board of Trustees (Tr. p. 279) reciting as one of the ''changed conditions'' the fact that the district has been granted a certain loan by the R. F. C. which it was expected would be consummated in the near future.

Petitioner's Exhibit 33, which is a copy of the second rehabilitation plan (Tr. p. 272) under the heading ''Standby Charges'' states that a charge will be collected to cover ''Interest and principal on R. F. C. loan''.

The same reference is found in the Third Rehabilitation Plan, Petitioner's Exhibit 34 and Exhibit 32.

A letter from the District to the bondholders, dated April 16, 1934 (Tr. p. 242) contains this statement:

> "As a result of negotiations with representatives of all groups of bondholders, the district is now in a position to make the following cash offer for your bonds,"

and the letter went on to state that it was uncertain just when the R. F. C. would "furnish the first part of the money to be loaned" and that it was desirable to deposit the bonds as soon as possible. This letter was signed by the president and all of the members of the board. In compliance with these instructions the bondholders send in their escrow agreements and instructions (see Petitioner's Exhibit 10) to Security First National Bank, which instructions stated (Tr. p. 174):

> "I hand you herewith................bonds......................, which you are authorized to deliver to or upon the order of the Board of Trustees of said Palo Verde Irrigation District."

These words "to or upon the order of the Board of Trustees of the Palo Verde Irrigation District" are extremely important. Substantially every bond that was deposited in escrow was deposited under these instructions. It is well known that such an expression passes title to and through the grantee. Under these instructions the bank was authorized to

deliver the bonds to the district or to such person as they might order. Title therefore passed through them, and once having passed through them could never be acquired by the R. F. C.

Another important link in the chain is the resolution authorizing instructions to the Security First National Bank (Respondent's Exhibit A, Tr. p. 178),

> "For the purpose of consummating the loan for which Palo Verde Irrigation District heretofore applied, * * * deliver * * * for the account of the Reconstruction Finance Corporation * * * upon collection * * * *for the account of this district,* of a sum equal to $1000 plus 24.81¢ per dollar of the aggregate principal amount of said bonds",

and then specifically instructed

> "From the proceeds received from the Federal Reserve Bank pay $1000.00 * * * also pay to Palo Verde Properties, Inc. * * * $5.00 for each $1000.00 of principal * * * also pay to yourselves the sum of $500.00."

This resolution was adopted October 26, 1934, and it was headed "Resolution Authorizing Instructions * * * in the matter of closing Reconstruction Finance Corporation loan escrow".

THE MONEY ADVANCED WAS PAID TO THE DISTRICT.

Now if this was an outright purchase of bonds by the R. F. C. and if that was the intention of the bondholders when they deposited their bonds in escrow and of the R. F. C. in depositing the amount of the loan with the Federal Reserve Bank and of the

District, why was it necessary for the district thus to participate in the escrow. The answer is obvious. It was because the bondholders considered that they were surrendering their bonds to the district pursuant to the letter from the district that the district was now able to pay cash and to make a certain cash offer for the bonds, whereby the bonds would be paid off and cancelled, and they were therefore appropriately delivering the bonds to the district or its order. It is no different in this situation than where a check is made payable to John Doe or order. John Doe must convey title to the check by endorsing his name on the back thereof. The bank was not authorized to deliver the bonds to anyone, not even to the R. F. C., but only to the district or its order. Once having acquired the bonds or an interest in them there is no authority in California law for the retransfer of such liquidated bonds. That they acquired them is conclusive from the fact of receipt of the money from the R. F. C.

They become securities which are *owned, held, and controlled by the petitioner* as mentioned in Chapter IX of the Bankruptcy Act. They cannot be counted in the 51%, nor in the two-thirds necessary for confirmation of a plan. *They have been fully liquidated.*

Lastly, attention is called to the fact that the district paid some $1400.00 or $1500 in the transaction. (Tr. pp. 177, 180.) The payment of that sum by the district fits in very well with the theory of the ap-

pellants, that the R. F. C. made a loan to the district and that its only right is to receive refunding bonds; but on the other hand it does not fit in at all with the theory of the district that the R. F. C. purchased the bonds like any common bondholder, since there is no authority in the law warranting a payment by the district for the benefit of a mere purchaser of its bonded debt and the transfer of that debt from one bondholder to another.

WHAT IS A PLEDGE?

In *Shelley v. Byers,* 73 Cal. App. 44, 238 Pac. 177, the complaint alleged that plaintiff was the owner of and entitled to the possession of certain property, which was denied in the answer. Whether plaintiff was the owner was the prime question in the case. The Court found for the plaintiff and entered judgment, which was reversed on this appeal.

The Shelley boys, who had conducted an army department store, went through bankruptcy.

Thereafter they entered into a contract with Gollober and Rosenberg, upon the face of which there was what purported to be a sale to them by the Shelley boys of certain property, including all of the stock in trade of the store, with a right to repurchase reserved to the Shelley boys.

Appellant's theory of the transaction is that it was a pledge. Respondent contends that the transaction was a sale with an optional right reserved to the vendors to repurchase.

The Court said, page 54:

> "Under our Statute a mortgagee of personal property in possession and a pledgee are practically, if not identically, the same. (Civ Code, Sec. 2924 and 2987.) *No legal title passes in either case,* but merely the right of possession for the purpose of security. (Civ. Code, Sec. 2888.)"

At page 62:

> "That the parties intended the property to be held by (G. & R.) as security is unmistakably disclosed by certain strongly marked features shown on the face of the writing itself. In the first place, *the transaction had its inception in a negotiation for a loan,* or for what is the equivalent of a loan, to the Shelley boys, even if the latter did not become personally liable therefor. This is one of the principal *indicia* of a pledge." (Cases cited and quoted from.)

The case of *Union Securities Inc. v. Merchants Trust and Savings Company* (Ind.), 185 N. E. 150, 95 A. L. R. 1189, is quite analogous to the case of *Shelley v. Byers,* supra. The facts and the law thereof are amply covered in the headnote thereof as follows:

> "A transaction whereby accounts receivable are assigned to another is, though denominated by the parties a sale of the accounts, in fact a loan, and the assignee of the accounts is not entitled to a preference out of the assets of the assignor in the possession of a receiver for the amount collected on such accounts by the assignor, where the arrangement was that the as-

> signee should advance 88 per cent of the face value of the accounts assigned, pay over an additional 10 per cent when the accounts should be paid, and keep 2 per cent as its profit, that the assignor should become a surety for the payment of such accounts, and collect them at its own expense, and the assignor, with the assignee's knowledge had mingled the proceeds of collection with other funds in its general bank account, paying 2 per cent a month for such amounts as were due and not remitted to the assignee, and the customers whose accounts were assigned were not notified of that fact."

The issue in that case is identical to the issue to be determined in the instant case, and is well stated, page 1193:

> "The decisive question in this case is whether the transaction between appellant and the Retherford Manufacturing Company was a bona fide sale of accounts as claimed by appellant, or was the transaction in fact a loan and the accounts assigned as security?"

The Court then proceeds to define a sale and a loan quoting from Cyc.

Although the contract on its face purported to use words of purchase and sale, the Court held it to be a loan.

The Court therein also discussed the facts and quoted from the case of *In re American Fibre Reed Co.,* 260 Fed. 309, 318. There, too, the corporation sold the accounts to the petitioner, which were collected by the vendors at their expense, the proceeds

to be applied first to the payment of the amount advanced by the vendee to the vendors, and the remainder of the amounts collected went to the vendors for their own benefit. The amount paid by the vendee was about 75 per cent of the face amount of the accounts, and accounts so sold were stamped on the books of the vendors as sold to the petitioner. The Court held:

> "Insofar as the contracts in question here used words fit for a contract of purchase, they are mere shams and devices to cover loans of money at usurious rates of interest."

The Court also cited and quoted from the similar case of *Chase & Baker Co. v. National Trust and Credit Co.,* 215 F. 633, 638. Passing on the question whether the agreement to buy accounts was in fact an agreement of sale or loan, the Court said:

> "A court of equity will not be frustrated in ascertaining the real intention of the parties to make a usurious loan by the fact that parol proof thereof would contradict the written evidence of the apparent transaction."

In another similar case, *In re Grand Union Co.,* 219 Fed. 353, 359, the Court said:

> "Stripped of the verbiage with which the parties have sought to clothe their transaction, the naked facts disclose that what they are doing was not a sale, but a loan, and that the leases were turned over simply by way of security. The Grand Union Company needed money and the Hamilton Company advanced it."

The test is stated as follows, page 1195:

> "The test which determines whether the real transaction between the parties was a loan or a sale is the intention of the parties and their intention is to be ascertained from the whole transaction, including the conduct of the parties as well as their written agrement. The facts as disclosed by the finding show that the real intention of the parties was to effect a loan at a rate of interest not otherwise collectable."

In re Grand Union Co., 219 Fed. 353, certiorari denied in 238 U. S. 626, and appeal dismissed in 238 U. S. 647, the corporation transferred to a credit company certain leases of personal property owned by it. The credit company claimed to have purchased the same under a contract at various discounts according to the maturity of the leases. The Court pointed out that while it will ordinarily assume, where the parties in a written contract call a transaction a sale, that they have used the term correctly and in its technical sense, yet, if the contract goes on to set out in detail the facts of the transaction which merely disclose that what the parties call a sale is in reality not a sale but a loan or bailment or mortgage, the Court must decide according to the real nature of the transaction, without regard to the terms the parties apply to it.

In the case of *In re Rogers,* 20 Fed. Sup. 120, at page 129, there is a discussion as to what a pledge is, the principal point being that one of the elements of a pledge is the sole right of the party to require the

payment of the sum for which the pledge was granted.

A debtor's note cannot be treated as collateral security for his own debt.

In the case of *Jones v. Third National Bank of Sedalia,* 13 Fed. (2d) 86, the debtor was indebted to the bank. Part of the debt was secured by Chattel Mortgages. The bank became apprehensive and the debtor gave a new note and chattel mortgage for any debts that are now owing or might be owing in the future. The first debt was paid, but the second note was retained for security for a new loan of $2400.00, for which the debtor gave a note reciting that the $5000.00 note was collateral. A further loan of $250.00 was made, but this note contained no recital of security. The bank filed its claim for the balance due on the $2400.00 and $250.00 notes and contended that its claim was secured one by virtue of the $5000.00 note. The Court said:

> "Collateral security has been defined as some security additional to the personal obligations of the borrower."

Stating that collateral security necessarily implies the transfer to the creditor of an interest in some property, or lien on property, or obligation, and stated that *a debtor's additional promises to pay cannot be treated as collateral security for his debt, unless such additional promises are themselves secured by a lien on property, or by the obligations of third persons.*

In the case of *Union National Bank v. Peoples' Savings and Trust Co.,* 28 Fed. (2d) 326, the Union Bank loaned $17,500.00 to the Jersey Cereal Food Company, which gave its judgment notes therefor. Being unable to pay, it gave its gold notes aggregating $19,000.00 to the bank as further evidence of the original loan. A receiver was appointed. The District Court allowed only the part of the claim based on the $17,500.00 notes and this was affirmed on appeal. The Court said:

> "when insolvency occurs, he (the creditor) must share pro rata with all the other creditors upon the basis of his real debt regardless of whether he holds one note or two."

An additional promise of a debtor to pay money cannot, from the very nature of the case, be treated as collateral security for his own debt.

> *Dibert v. D'Arcy,* 248 Mo. 617 at 643, 154 S. W. 1116;
>
> *In re Waddell-Entz Co.,* 67 Conn. 324 at 334, 35 Atl. 257,

and the note which is security will be void.

Where personal property is transferred by a debtor to a creditor, the presumption is that the transfer is made as collateral security for the debt.

> *Borland v. Nevada Bank of San Francisco,* 99 Cal. 89.

Strange it is in the instant case that the R. F. C. took no part in the case and made no effort to establish its position, but that on the other hand the petitioning debtor strenuously endeavors to prove that

it is indebted to the R. F. C. not for $1,000,000 but for $4,000,000.

In *Commercial Security Co. v. Holcombe,* 262 F. 657, the Court said:

> "The nature of a transaction is determined not by the name given to it by the parties, but by its operation and effect. That a transfer of paper evidencing indebtedness payable after the date of the transfer, and which does not include any interest, is not a sale, is quite obvious, when the transferer is required to pay to the transferee interest on the amount owing on such paper before anything is payable by maker, and the transferer has the right to reacquire the paper by paying to the transferee the sum it calls for the interest thereon."

Statutes are construed by the same rules as are contracts. The Court is respectfully referred to the language of the Act (Title 43, Sec. 403, U. S. C.) calling for an "application" for a loan, that its purpose is to "reduce and refinance its (the district) outstanding indebtedness", the term shall not exceed forty years, the loan shall be "secured" by obligations of the district paid by taxes, the "borrower" cannot issue further bonds (other than the refunding bonds) without the consent of the R. F. C., the "borrower" shall agree to apply a certain part of its taxes to retire the loan, and before the loan agreement is made the R. F. C. must be satisfied that an agreement has been made between the "applicant and the holders of the outstanding bonds—under which the applicant will be able to purchase or refund all or a major

part of such bonds at the price agreed". None of these things can be done by the bondholders, and therefore, the loan contracting party is the district.

The Court is referred further to the language of said Act which provides:

> "Such loan shall be subject to the same terms and conditions as loans made under Section 605 of Title 15 * * *"

This is the Reconstruction Finance Corporation Act itself. This latter Act has been construed as limiting the power of the Corporation to the making of loans, and there is nothing in the Emergency Farm Mortgage Act which would increase that power.

In *R. F. C. v. Central Republic Trust Company,* 17 F. Supp. 263, the Court said (p. 292):

> "There is no intimation of the intent (by Congress) to use the words 'loans', 'notes', and 'obligations' in any other than their usually accepted meaning."

The Court said (p. 293):

> "Plaintiff corporation (R. F. C.) was created and expressly authorized to make contracts for *loans,* and to sue and to be sued with reference thereto."

The words inserted in the parentheses are added in order to clarify the sentences.

And again the Court says (p. 293):

> "Here Congress has created a corporation, endowed it with the power of a private corpora-

tion and given it power to make contracts with reference to *loans* by it."

In the case of *Baltimore National Bank v. State Tax Commission,* 297 U. S. 209, 80 L. Ed. 850, 56 S. Ct. 417, in a decision written by Mr. Justice Cardozo, the Court discussing the capacity of the R. F. C. said:

> "Until then there was no power on the part of the Reconstruction Finance Corporation to subscribe for such shares or indeed for any others."

In the case of *Continental National Bank v. Chicago, Rock Island & Pacific Ry. Co.,* 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595, the Court said:

> "The Reconstruction Finance Corporation Act creates a corporation and vests it with designated powers. Its entire stock is subscribed by the Government but it is none the less a corporation limited by its charter and by the general law."

In *U. S. v. Doherty,* 18 F. Supp. 793, the Court, in discussing F. D. I. C., says:

> "The Federal Deposit Insurance Corporation is not a corporation organized for private profit. It is financed by the government and its instrumentalities, the Federal Reserve Banks."

The R. F. C. was similarly incorporated for a public purpose, and not for private profit. The fact that such corporation is not incorporated for profit, negatives any idea that it is other than a lending agency of the United States Government to and with political subdivisions. It cannot deal in the securities of such

districts as a private owner for profit, but only holds such securities for the purpose of protecting them in carrying out the purposes and objects of the Act.

We also call to the Court's attention an Act to authorize irrigation districts to cooperate and contract with the United States Government. (Stats. 1917, p. 243.) Section 11 thereof was amended (Stats. 1933, p. 2394) to provide:

> "In addition to other powers in this act conferred, irrigation districts shall have authority to *borrow or procure* money from the United States or any agency thereof, for the purpose of *financing* or *refinancing* of the obligations of the district or the *funding* or *refunding* or *purchase* of the bonds of the district, or for any of the other purposes of the district authorized by the California Irrigation District Act, or acts amendatory thereof or supplemental thereto. As evidence of such *loan or loans* and the obligations of such district to repay the same to the United States or any agency thereof, any irrigation district, * * * may make and enter into contract or contracts with the United States or any agency thereof, as a condition or requirement to the making of such *loan or loans.* Such district may issue bonds of such district as may be required by the contract last above provided for or without such contract, containing such terms and conditions and payable in such manner and from such source or sources of income and/or revenue as may be agreed upon between * * * (them) * * * and may obligate and bind the district for the payment of such bonds according to the term thereof. * * *."

By no stretch of the imagination can this Act be interpreted as authorizing the district to enter into any other form of contract than that of a loan to the district.

FIFTH PROPOSITION: THE PLAN IS ONE FULLY EXECUTED OUT OF COURT, AND NOT PURSUANT TO THE STATUTE.

Assignment of Error No. 9 reads as follows:

> "The court erred in finding that Reconstruction Finance Corporation did not accept said plan several years ago or at any time prior to May 5, 1938, and in finding that said corporation was not nor was petitioner bound by said plan prior to the commencement of this proceeding, and in finding that said corporation is affected by said plan."

Assignment of Error No. 11 reads as follows:

> "The court erred in finding that said plan was not prepared or substantially completed or executed several years before the commencement of this proceeding, and in finding that said plan is a plan of composition pursuant to said Chapter X."

Assignment of Error No. 28 reads as follows:

> "The court erred in not holding that under the terms of California Statutes of 1937, Chapter 24, Section 19, said Reconstruction Finance Corporation and petitioner were bound by said plan of composition prior to the commencement of this proceeding and thereby said corporation is not affected by the plan referred to in this proceeding."

In the case of *In re West Palm Beach,* 85 Fed. (2d) the Court had before it a situation where the city had before passage of Section 83 carried out a plan to the extent of exchanging the securities involved, leaving, however, a minority of original bonds outstanding. The city sought, after Section 83 was enacted, to compel the minority bondholders to accept the plan.

The Court said:

> "In bankruptcy matters composition has a special meaning, to-wit, a settlement or adjustment which is enforced by the court on all creditors after its acceptance by a required majority. A proposed adjustment out of court is not a plan of composition, but it may become one by being presented to the court."
>
> "the plan with its acceptance became incapable of presentation as a composition because it has been largely executed."
>
> "The owners of these were no longer acceptors of an executory plan, but had been fully settled with under it and no longer had any direct interest in it. They could not fairly be counted as voters before the court on the propriety of the plan. Of course they would wish the nonacceptors to be forced to scale their debts as they themselves had done. They could no longer have an open mind as to whether, in the light of developments, the plan was a good one or a bad one."

Subsequent to the decision in this case Congress, in order to counteract its effect, added sub-section (j) to Section 83 providing:

> "(j) The partial completion or execution of any plan of composition as outlined in any peti-

tion filed under the terms of this title by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this title, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition. As amended June 22, 1938, c. 575, 3 (b) Stat. 940."

Appellants question the power of Congress to pass such a statute—avowedly declared that what the Court decrees to be inequitable shall henceforth be considered equitable.

Be that as it may, the doctrine of *inclusio unius est exclusio alterius* will result in the conclusion that where a loan has been made, but actual securities *have not* been *exchanged,* rules of equity may still apply.

In the instant case the plan was fully carried out so far as the consenting old creditors were concerned when they deposited and were paid for their bonds, for liquidation.

If the R. F. C. be regarded as a holder of original bonds and of like standing with the appellants, then the plan was fully effected as to it when the first bankruptcy petition was filed under Section 80, for the R. F. C. on Feb. 26, 1935, accepted the plan (Tr. p. 296) in the former bankruptcy proceeding.

This question of the position of the R. F. C. is one of the most important in this appeal.

If ordinary rules of judicial interpretation are to be applied there can be no question of the outcome.

If the *result* of such interpretation is first to be scrutinized, to ascertain whether thereby Chapter IX and the general pogrom against the public creditor class is to be fully carried out, the appellants are perhaps lost anyway.

At each turn where the question of the position of the R. F. C. arises this simple question can be asked:

"What would have been the position of the R. F. C. had Congress *not* passed Section 83?"

The answer is equally simple. Unquestionably the Courts would have determined that the R. F. C. had only the rights proposed in the plan, was bound thereby, and that it was a creditor entitled to payments according to the new refunding bonds and no more.

If more evidence be required of the soundness of appellants' position, attention is directed to the acceptance of the plan in the State Court proceedings dated April 9, 1937 (Tr. p. 150) and the effect of such acceptance.

Sec. 19 of Cal. Stats. 1937, Ch. 24, provides:

> "In the event that said petition for liquidation, refinancing or readjustment is dismissed, * * * such dismissal * * * shall not affect the effectiveness of the plan with respect to the district or holders of bonds or warrants accepting the same."

Appellants submit that as a matter of fact and as a matter of *law,* the debt relief was, in effect, carried out long prior to enactment of Sec. 83 and not pursuant to the statute and that the effect of said Sec. 19 of the Irrigation District Refinancing Act is to definitely place the R. F. C. where it is not in any sense a creditor affected adversely by the plan in these proceedings.

SIXTH PROPOSITION: THE CLAIMS ARE NOT ALL OF THE SAME CLASS.

Assignment of Error No. 13 reads:

> "The court erred in holding that all of the bonds and indebtedness included in the plan of composition are of one and the same class, and are payable without preference."

Section 83 (b) requires that:

> "the judge shall classify the creditors according to the nature of their respective claims and interest: Provided, however, That the holders of all claims, regardless of the manner in which they are evidenced, which are payable without preference out of funds derived from the same source or sources shall be of one class. The holders of claims for the payment of which specific property or revenues are pledged, or which are otherwise given preference as provided by law, shall accordingly constitute a separate class or classes of creditors."

This question somewhat overlaps other questions discussed in this brief, and it will suffice therefore

to point out the separate classes of creditors as follows:

1. The R.F.C. since it is not the owner of the bonds it claims to hold, is in a separate class from the appellants. Even if it be deemed that the R.F.C. holds these bonds as collateral to a loan, inasmuch as the beneficiary or beneficial interest in the bonds must be in the district, the claim of the R.F.C. is based upon the loan and not upon the bonds.

2. The judgment holders are creditors because they hold judgments, and because these judgments are judgments against other jurisdictional persons than the bankrupt.

3. The holders of the alternative writ of mandate are creditors of a separate class because they are creditors holding a pledge or security as specific property and revenue.

4. The holders of bonds and coupons which have matured are creditors of a separate class because they are primarily the beneficiaries of the trust funds and properties. These claims are payable in the order of presentation since they should have been so paid, until the funds and properties may have been exhausted. Therefore, each bond and coupon may be in a separate class.

The R.F.C. does not claim any matured interest coupons nor does it claim to have presented any matured bonds. (Tr. p. 48.) Of these many are "outlawed".

5. The Drainage Act provides (Appendix p. 23) that the drainage bond issue is a prior lien (or claim)

to any subsequent issue. In a technical sense, perhaps, the bond issue is in itself a lien, but the intent of the statute was to give this entire bond issue a priority to subsequent issues.

> *State v. Forsyth* (1932 Wash.), 15 Pac. (2d) 268, at 271, column 1, 170 Wash. 71.

Attorney General U. S. Webb in an opinion to the District Attorney in re the Palo Verde Act, dated March 24, 1932, No. 7977, said:

> "I concur in your opinion that the tax levied for any succeeding year, as provided in Section 28, should be applied only to the payment of the requirements of maturing installments of principal and interest for said year."

SEVENTH PROPOSITION: THE PLAN OF COMPOSITION IS NOT FAIR, EQUITABLE, OR FOR THE BEST INTERESTS OF CREDITORS, AND IT IS DISCRIMINATORY.

Assignment of Error No. 10 reads in part as follows:

> "The court erred in finding said plan of composition to be fair, equitable and for the best interests of creditors affected thereby, and in finding that it did not discriminate unfairly in favor of any creditor or class of creditors, * * *"

The plan is unfair, unjust and inequitable because:

1. The value of the land within the Palo Verde District warrants a vastly more generous payment to the bondholders. The assessed value of the land itself of the district was more than Five Million Dollars in 1927 and approximately Three Million

Dollars in 1937. (Tr. p. 258.) The appraiser for the R.F.C. placed a value on the land of seventy to eighty dollars per acre, speaking of clear and improved land. (Tr. p. 295.) This on 30,000 acres of land alone would be two and a quarter million dollars.

2. No provision is made for future prosperity of the district. Many of respondents' bonds mature far in the future, and the district may be very easily able to pay them. (A.I. No. 23, Tr. p. 346).

3. The State of California is the owner of 99.66% of the land (Tr. p. 187, 264.) It is unjust, if not unconstitutional that the state should thus be enriched. If this does not confiscate private property in public bonds to pay public debt, it would seem that whether the bondholder may or may not collect his claim from the state itself, the state may not thus void the debt.

4. It is unfair, if not unconstitutional to take the property of the bondholder who is a creditor of the public corporation, so to speak, and give it to enrich the landowner, who is the stockholder, of the corporation, so to speak. *Northern Pacific Ry. Co. v. Boyd,* 228 U. S. 482; 33 S. Ct. 554 (1913). A. of I. No. 40, Tr. p. 350).

5. It is unfair to pay to the bondholder only such amount as the banker (the R.F.C.) is willing to loan during a panic. *These* creditors are willing to loan more. They wish merely to keep their bonds.

6. It is unlawful for the district to issue new refunding bonds for the R. F. C. which would exceed 60% of the value of the bare land plus the works of

the district. Cal. Stats. 1917, page 243. Nothing, however, except the decree of the bankruptcy court, prevents these creditors from retaining bonds which may possibly exced 60% of the value of those assets.

7. The loan from the R. F. C. is for thirty-three years only. These serial bonds could have been issued for fifty years. Then years added to the life of bond issue would have netted thirty-five to forty per cent more for the bondholders. The life of the irrigation system is more than fifty years.

8. The R. F. C. has requested and received 4% interest on its alleged claim, but these respondents are denied the same consideration. (Tr. p. 277.)

9. The R. F. C. as an alleged creditor will receive 4% bonds for its claim, but these respondents must take cash at the option of the petitioner.

10. The R. F. C. will receive 100 cents on the dollar plus 4% interest for every dollar it loaned; the appellants 24 cents, without interest.

11. The holders of the private mortgage bonds (Mutual Water Co.) involved in this composition received fifty cents on the dollar of principal of their debts, but these respondents must take less than twenty-five cents on the dollar. In point of law the bondholders have a superior claim. In fact e. g., the Drainage Act, Sec. 30 (Appendix p. 23) provides that the drainage bonds are a preferred lien to any subsequent issue. Drainage bonds are held by appellants Jordan and First National Bank of Tustin.

12. Trust funds of the district, consisting of $100,000 cash on hand (Tr. p. 274,) which is already

earmarked by an alternative writ of mandate (Tr. p. 304), and which belong to them, *(Provident Land Corp. v. Zumwalt,* 85 Pac. (2d) 116, 96 C. D. 497; *McKaig v. Moutrey,* 96 C.A.D. 335; 90 Pac. (2d) 108) are taken from appellants by this decree, contrary to principles of equity if not to the Fifth amendment to the Constitution of the United States. Likewise, trust properties of this district, being all of its assets and properties on hand for the uses and purposes set forth in the respective acts under which the bonds were issued are taken from these appellants. It might have been different had annual levies of assessments not been made and the assessments not been foreclosed. Under such circumstances the rights of these creditors might not have vested, but when the district in the exercise of its public trust, took title to 99.66% of the real property in the district it holds that property not as a debtor but as a public trustee, *and no trustee, we submit, can take trust property into bankruptcy.*

13. It is unfair to deprive these respondents in these proceedings of their right to pursue the liability of the County of Riverside, of the Drainage District, and of the Levee District. This matter of vicarious liability is discussed further below.

14. It is unfair to scale down the claims of these creditors when other bond issues of the County and of the City of Blythe are not similarly scaled down. (Tr. p. 188.) County bonds have been paid 100% and although these bonds are in point of remedy superior to those of the County issues, appellants must take twenty-four cents of principal and nothing for in-

terest. (The City of Blythe bonds were bought up at an average of fifty cents on the dollar by private and voluntary agreement.

15. The plan allows the district to retain its water rights, headgates, lands, canals, and other valuable property, which properties were procured with moneys loaned by the bondholders, whereas the plan of composition was in no manner based upon any valuation for such properties. (A. of E. No. 24, Tr. p. 346.)

16. The Levee Bondholders' right to an assessment against the personal as well as real property of the landholders was not taken into consideration.[1] (A. of E. No. 38, Tr. p. 349.)

EIGHTH PROPOSITION: THE PLAN OF COMPOSITION IS NOT PRESENTED IN GOOD FAITH.

I.

Assignment of Error No. 10 reads in part:

> "The Court erred in finding * * * that the offer of the plan and its acceptance are in good faith, * * *."

The effect of good faith upon a plan of composition should be the same as the effect of fraud upon a discharge in bankruptcy. Consequently it would appear that not only should the district and its officials be free of any charge of fraud, but that all of their dealings and transactions should show them to have been unbiased, unprejudiced trustee for the bondholders as

1. The Levee bonds were collected from assessments against personal property as well as real property. See Levee Act, Sec. 10. Appendix p. 28.

well as the landowners and for the state itself. They are public officials and trustees whose duty it is to faithfully perform the obligations laid upon them by statute, and to disclose to the Court with impartiality and fairness all of the resources of the district, nor should they contrive to scheme with one creditor to defeat the rights of other creditors.

The S. E. C. is not permitted to intervene in this case as in corporate reorganizations. Surely the investigation conducted with regard to bondholders' committees and reorganizations generally as well as those pertaining to public corporations develop the need for extreme watchfulness on the part of the Court.[2]

Under these circumstances it was all the more the duty of the trial Court carefully to investigate the circumstances, as Mr. Justice Brandeis said in the case of *First National Bank v. Flershem,* 290 U.S. 504, at 525 (1934), the Court in a reorganization case stands

> "in a position different from that which it occupies in ordinary litigation, where issues are to be determined solely upon such evidence as the contending parties chose to introduce."
>
> "* * * every important determination by the court calls for an informed independent judgment; * * *".

It was held in *National Surety Company v. Coriell,* 289 U.S. 426 at 436 (1933):

> "It would be unreasonable to impose upon a few dissenting creditors the heavy financial burden of

2. See "Improvement in Federal Procedure for Corporate Reorganizations" by Hon. William O. Douglas as Chairman of the Securities and Exchange Commission, Nov., 1938, American Bar Association Journal.

making an adequate appraisal, supported by the testimony of competent experts. * * *".

There was in fact no such sort of investigation by the Court. The bondholders were given no funds or means with which to make their investigation nor was there anyone to defend or protect their interests. In fact the hearing lasted approximately an hour and consisted of the deposit in Court of a transcript of proceedings taken in a former hearing in a proceeding for the same purpose in the State Court, which petitioner has since abandoned.

A want of good faith is shown in these proceedings by the following circumstances:

1. An entire want of cooperative effort on the part of the district to lay the facts before the Court in other than a bitterly partisan spirit showing the utmost hostility towards the objectors.

2. A long list of harassments of these appellants, commencing with the filing of the first bankruptcy petition under the former Section 80, including injunctions against the prosecution of respondents' rights in the State Court, the filing of the petition under the Irrigation District Refinancing Act in the State Court, obtaining injunctions out of that Court to prevent the respondents from collecting anything upon their interest payments or bonds. In fact for a long period of years stubborn resistance at every point to the payment of anything whatever to these respondents.

3. The execution of the so-called "bastard" agreement (Tr. p. 236, Ex. 20) and what practically

amounts to connivance with and of the R. F. C. to try to establish the ownership by that agency of bonds which everyone knows and considers have been completely refinanced in order that the R. F. C. may qualify as a creditor and seek to out-vote these appellants.

4. Failure of the county and district's officers to endeavor to meet according to law the obligations to the bondholders.

5. Assisting a creditor to "buy its way into Court", contrary to principles of equity, in that petitioner aided the R. F. C. at every turn to acquire its own bonds to permit the filing of a bankruptcy petition. Such practice has been denounced in the case of *in re Hudson Coal Co.,* 22 Fed. Sup. 768 at 770.

> "Counsel for the petitioning creditors stated for the record that the petitioners purchased the unmatured bonds for the purpose of enabling them to file a petition for reorganization. In any proceeding of an equitable nature where good faith is required, parties may not purchase themselves into court. Justice, equity, and public policy prohibit this. If there were no case on the subject, this court would be obliged to decide on principle that such method of procuring the means of instituting such suit shows a lack of good faith."

6. By contributing to the alleged "purchase" price paid by the R. F. C. through the district to those who surrendered their bonds for the liquidation price offered. (Tr. pp. 170, 180-81.) $1450 was so paid. If petitioner be permitted to sustain its claim that the R. F. C. "owns" the bonds it claims, how can this contribution to the act of purchase be justified? Surely it

is not lawful for the district to thus aid one person solely to acquire bonds already issued and outstanding, from another bondholder. Most certainly there is no statute permitting such disbursement.

NINTH PROPOSITION: THE STATE AS A DEBTOR CANNOT REPUDIATE ITS OBLIGATIONS IN THESE PROCEEDINGS.

Assignment of Error No. 42 reads:

> "The Court erred in determining that by these proceedings the obligation of the State of California upon the securities affected by the plan could be voided."

In the case of *El Camino Irrigation District v. El Camino Land Corporation,* 96 C. D. 505, 508, 85 Pac. (2d) 123, 125, the Court states:

> "But the cases make a sharp distinction between municipal corporations, such as the cities in the Kubach Company and Marin Water and Power Company cases, and state agencies such as irrigation or reclamation districts. These latter are agencies of the state whose functions are considered exclusively governmental; their property is state owned, held only for governmental purposes; they own no land in the proprietary sense, * * *"

Since, therefore, the Palo Verde Irrigation District owns the title to 99.66% of the real estate within its boundaries, *the state is now in actual fact the owner of that property.*

Furthermore, that property is no longer subject to assessment and taxation for even county purposes.

This was definitely held to be so in the case of *Anderson-Cottonwood Irrigation District v. Klukkert,* 97 C. D. 348, 88 Pac. (2d) 685.

We therefore have the State of California owning the land and assets of this district, including its valuable water rights upon the Colorado River (Tr. p. 186) coming into this Court and seeking by these proceedings to destroy a public trust, which it has established by its own statutes, submitting its own governmental and fiscal affairs to the jurisdiction of this Court contrary to the very provision of Chapter IX of the Bankruptcy Act as we have shown elsewhere in this brief, and seeking thereby to repudiate its own public debt.

(These bonds bear the great Seal of the State and Certificate of the State Controller, irrevocably certifying them as lawful investments for savings banks, trust funds, and any funds that may be invested in State Bonds.)

Even in the minority opinion written by Mr. Justice Cardozo, in the case of *Ashton v. Cameron County Irrigation District,* that learned justice said:

> "There is room at least for argument that within the meaning of the Constitution the bankruptcy concept does not embrace the states themselves."

The remarks of the Chief Justice in the *Bekins* case that the new act was careful not to impinge upon the sovereignty of the State, that "the State retains control of its fiscal affairs", can only mean that the State cannot surrender its sovereignty.

TENTH PROPOSITION: THE DECREE UNLAWFULLY TAKES TRUST FUNDS AND VESTED RIGHTS BELONGING TO RESPONDENTS.

Assignment of Error No. 37 reads:

> "The court erred in approving and confirming the plan of composition without provisions for appellants' vested rights in trust funds and properties, including proceeds of assessments, tax certificates, land to which title has been taken under tax sales and proceeds thereof, the right to levying of annual assessments both in the past and future, and moneys impounded by writ or writs of mandamus heretofore issued."

1. Appellant Jordan has a judgment against the Palo Verde Drainage District and the Palo Verde Joint Levee District of Riverside and Imperial County, California. (Tr. p. 300 and pp. 315, 318.) The First National Bank of Tustin likewise has a judgment against the Drainage District. Mason would have had a judgment against the Palo Verde Joint Levee District, but for the pendency of the State Court bankruptcy proceedings. (Tr. p. 302.) While these judgments are not final because an appeal was filed and the prosecution of the appeal enjoined through action of the various bankruptcy Courts, to which petitioner has resorted, nevertheless those judgments stand with certain presumptions before this Court. A judgment is *property,* and as such is a *vested right.* These judgments constitute the judgment holders as creditors of a somewhat different class. They also are judgments against *other debtors* than the bankrupt. The release of one party to a liability does not necessarily release all

parties unless the claim is extinguished. While it may be true that a composition is an extinguishment of the debt, and might have that result, if the decree herein becomes final, such result is but a reason why appellants Jordan and First National Bank of Tustin at least are creditors of a separate class from the other appellants by reason of such judgments.

2. Each of the appellants has a vested right in the writ of mandate which was obtained from the Superior Court earmarking certain funds as trust properties belonging to them. 7 *Corpus Juris* 326; *Lawlor v. City of West Palm Beach,* 125 Fla. 626, 170 So. 697; *City and County Holding Co. v. Board of Public Instruction,* 120 Fla. 599, 603 So. 808; *City of Winter Haven v. Baynes,* 114 Fla. 522, 154 So. 870; *Ecker v. South West Tampa Storm Sewer Drainage District,* 76 Fed. (2d) 870 at 872. *Hidalgo County Road District v. Morey,* 74 Fed. (2d) 101, where the Court said:

> "A fund created pursuant to statute to be used in paying the interest and principal of bonds issued by a public body is held *in trust* for the bondholders, and a court of equity has jurisdiction to protect and enforce the rights of bondholders in such fund."
>
> *Hidalgo County Road District v. Morey,* 74 Fed. (2d) 101.

The rights against the trust fund accrue in accordance with presentations after maturity, and thus prompt presentation is important.

> "At the time when Laforge presented his warrants for payment there being money in the

treasury which had been appropriated under a previous and existing law for that purpose, his right became fixed and could not be destroyed by subsequent legislative enactment. It was the duty of the treasurer to pay the warrants at the time of their presentation and the subsequent Act of the Legislature could not intervene to divest rights already acquired."

Laforge v. MaGee, 6 Cal. 650, 651.

"The substance of the provisions of the act of 1851 is, that a sufficient sum of money to answer the purposes of that act shall be collected by taxation, and having been collected and paid to the treasurer of the corporation, *it stands as a trust fund which the treasurer, as the bailee of this sum, is to pay to the commissioners.*"

People v. Bond, 10 Cal. 563 at 573, 574.

3. All the property held by the Palo Verde Irrigation District including its funds and its tax deeded properties, constitutes trust property belonging to bondholders who hold matured obligations in the first place, and to the bondholders holding maturing bonds in the second place, as was said in the case of *Morris v. Gibson,* 88 C. A. D. 703, 89 C. A. D. 140, 87 Pac. (2d) 37, 42:

"A purchaser of bonds may and probably often does deliberately select bonds of late maturity in preference to bonds maturing at an earlier date, and having made that selection he should not be permitted, without good reason to now alter his position."

Section 46 of the Drainage Act (see Appendix) provides:

> "The following funds are hereby created and established to which the moneys properly belonging shall be apportioned by the treasurer, to-wit: bond fund, construction fund, general fund, funding fund."

Section 48 provides:

> "Upon the presentation of the coupons due to the treasurer he shall pay the same from the bond fund."

Section 29 of the Palo Verde Irrigation District Act as amended in 1927, Cal. Stats. 1927, page 972, reads as follows:

> "All moneys collected from the district, either from taxes or from any other source, shall be paid by the collector to the County Treasurer of the County of Riverside, and placed in the fund called 'Palo Verde Irrigation District Fund'. It shall be the duty of said County Treasurer, upon presentation of any matured bond or interest coupon of any bond of any of said three districts, to pay the same from said funds."[3]

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3. In an opinion written by Albert Ford, District Attorney of Riverside County, dated April 17, 1930, to Miss Alice Mitchell, Riverside County Treasurer, Riverside, California, the District Attorney said: "It is my opinion that you are required to pay any matured bonds or interest coupon of any bond of any of the three districts, from the Palo Verde Irrigation District Fund, so long as there is any money in that fund; bearing in mind, however, that money in that fund that was raised to pay the bonds or interest coupons of any of the various districts can be used only for such payments. It is my suggestion that you keep a subsidiary account or accounts, which will enable you to segregate any bond or coupon money that comes into your hands and see to it that such money is applied to such bond or interest coupons to which it is applicable. If such funds prove inadequate to pay such bonds or coupons, then it is your duty, in my opinion, to use any money remaining in the fund, for the payment of any of the matured bonds or the interest coupon of any bond."

The other acts involved contain similar provisions. The California Appellate and Supreme Courts have decided in a number of cases that such funds collected constitute trust funds which belong exclusively to the particular beneficiaries of the trust. These decisions hold that assessments placed, or which should be placed in the bond fund, when collected, belong to the bondholders and that all of the properties of the district are held in trust for the benefit of the bondholders as beneficiaries of the public trust. Section 5 of the Palo Verde Irrigation District Act provides:

> "The legal title to all property acquired under the provisions of this act shall immediately, by operation of law, vest in the district, and shall be held by the district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this act. And said board is hereby authorized and directed to hold, use, manage, keep and possess said property as herein provided."

This is substantially the same provision as Section 29 of the California Irrigation District Act which has been interpreted by the Supreme Court in a number of cases. In the case of *Moody v. Provident Irrigation District,* 85 Pac. (2d) 128, 130, 96 Cal. Dec. 512, the Court said:

> "It is settled law that an irrigation district is a governmental agency, * * * Likewise, it is also well settled that the law in force at the time the bonds and coupons are issued by a district become a part of the contract."

> "That the annual assessments and the sale of lands upon which the assessments are not paid, may never realize sufficient money to pay the indebtedness of the district, is entirely beside the question. The property of the district, so far as it owns any property, constitutes a public trust and is held by the district for a public use, and, therefore, is not subject to levy and sale upon execution by a creditor of the district."

In the case of *Clough v. Compton Delevan Irrigation District,* 85 Pac. (2d) 126, 96 Cal. Dec. 509, referring to Section 29 of the California Irrigation District Act, the Court said:

> "The property is by this language impressed with a public use, and trust is for all the purposes of the act. Payment of the bondholders is such a purpose, * * * It is enough to point out that it is an active trust for public uses and purposes, and to permit partition of the lands which constitutes its corpus would mean the destruction of the trust, in violation of the statute. The same considerations of policy which make this property exempt from execution * * * are equally applicable to any attempt to take the same by partition."

In the *Provident* case the Court further said (85 Pac. (2d) 116, 118):

> "The ordinary method of payment of bondholders is clearly indicated by these provisions. The directors must levy assessments in a sufficient amount to meet principal and interest payments. If delinquency occurs a higher assessment may be levied thereafter to make up the

loss, and meanwhile the district may proceed to sell the land of the delinquent owner and buy it in. If a heavy delinquency occurs, the remaining land bears a correspondingly heavy burden, for every parcel is liable ultimately for the entire bonded indebtedness, and assessments may therefore be 'pyramided' on the land which is not in default. It would ordinarily follow, however, that the land taken in by the district would be resold, and some money would be realized from the sale; and that thereafter the land thus returned to private ownership and liable again for assessments would prove a sufficient source of revenue to keep the assessments at a reasonable figure."

The Court, after discussing the result of the failure of this procedure, and remarking that these districts have long been in default in bond payments says (p. 119):

> "The delinquencies have gone too far in this and other districts to save the landowners."

The Court further said (p. 120):

> "the lands remain in trust, and the district exercises its powers, however broad, as a trustee. Once it is made clear that the lands are held in trust, it necessarily follows that their proceeds, whether by sale or lease, are likewise subject to the trust. It would be manifestly absurd to say that although property is held in trust, none of the benefits of the trust accrue to the beneficiaries, and that none of the rents or profits of the trust property need be used in furtherance of the trust purposes. On this point, namely, that the land

is trust property, held for the 'uses and purposes' of the act, and that the proceeds are stamped with the character of the property from which they flow, the statute, read in the light of elementary principles, leaves no room for debate."

"It next becomes necessary to determine whether payment of the bondholders is one of these purposes. * * * defendants and amici curiae vigorously contend that * * * creation of debts is not one of its purposes. * * * This type of argument, however, tends to prove too much * * * But laying aside quibbles as to the exact meaning of the phrase 'uses and purposes', it seems clear that if the district is to be created and to function on borrowed money, repayment of the money is not a wholly immaterial and foreign objective. Evading creditors is not a contemplated activity of a public district, whose bonds are recognized investments for financial institutions. Among other purposes of the act, therefore, is the repayment of the bondholders of the district, and it follows that this is one of the purposes for which the trust money is held."

"The land is the ultimate and only source of payment of the bonds. It can never be permanently released from the obligation of the bonds until they are paid * * * Any practice which removes the land from its position as ultimate security for the bonds, or which places its proceeds beyond the reach of bondholders, destroys that plan and is contrary to the spirit of the act."

See, also:

Selby v. Oakdale, 140 Cal. App. 171, 177, 35 Pac. (2d) 125;

McKaig v. Moutrey, 90 C. A. D. 335, 90 Pac. (2d) 108.

Appellants refer to the case of *Erie Railroad Company v. Tompkins,* 58 S. Ct. 817, 304 U. S. 64, holding that the Federal Court shall follow the decisions of the State Court upon questions of state law.

ELEVENTH PROPOSITION: THE LIABILITY OF THE LEVEE DISTRICT, AND OF THE DRAINAGE DISTRICT, AND OF THE COUNTY OF RIVERSIDE WAS NOT TAKEN INTO CONSIDERATION BY THE COURT.

Assignment of Error No. 27 reads:

"The court erred in not holding that some of the bonds and interest coupons held by appellants and some of the outstanding obligations of Palo Verde Irrigation District are obligations of the Palo Verde Drainage District and some are obligations of the County of Riverside, California, and some are obligations of the Palo Verde Joint Levee District of Riverside and Imperial Counties, and this court is without power or jurisdiction to consider or allow or approve any plan of composition or proceeding involving or affecting any of the said obligations of the Palo Verde Drainage District or of the County of Riverside, California, or of the Palo Verde Joint Levee District of Riverside and Imperial Counties."

The Levee District was organized under Cal. Stats. 1905, page 327. Section 10 provided that the Board of Supervisors of the county must levy a tax upon all *taxable property* in the Levee District sufficient for the levee districts' purposes. (This of course includes personal property as well as improvements upon real estate, as well as all property in the incorporated City of Blythe.) These taxes were collected at the same time and manner as county taxes. (See Appendix.)

By Section 11 of the Levee Act the Board of Supervisors is given the same control over the affairs and property of the Levee District as it has over county property.

It is to be noted too that the area of the Levee District is not identical with that of the irrigation district.

The bondholder of the Levee District, then, had under familiar principles the right to the exercise of those powers by the Board of Supervisors upon the formation of the irrigation district. Section 12 of the Irrigation Act (Appendix p. 49), preserved to the bondholder such rights as he had under the Levee Act.

Furthermore the Superior Court in Riverside County has already granted judgments against the Levee District thus determining its separate existence as an entity and party and the separate existence of rights against such entity.

The Levee District is not a party to these proceedings and it is not well seen how the District Court could wash it clean of obligations.

7 *C. J.* 409, Sec. 726:

"A discharge in bankruptcy is personal to the debtor and does not affect the liability of one who is a codebtor with, or a guarantee or a surety of, the bankrupt."

The County of Riverside had a responsibility in the matter. It may be that so long as the irrigation district under injunction of the Palo Verde Irrigation District Act performed its vicarious duty to collect upon the Levee bonds, the county's duty was performed to such extent, but for failure to perform such duty, the county is liable, not only for failure to assess the personal property as well as all taxable property, but for the collection and proper disbursement thereof.

Read v. Biczkiewicz, 18 N. E. (2d) 789 (not yet in State Reports);

Henning v. City of Caspar, 5 Wyo. 1, 57 Pac. (2d) 1264;

Cruzen v. Boise City, 74 Pac. (2d) 1037.

The Drainage District Act (see Appendix) likewise contains provisions for the proper collection of taxes and disbursement thereof so whatever conclusion is reached as to the Levee Act, applies also to the Drainage Act.

The intricacy of the accounting problem is shown by an opinion of District Attorney Ford to the Riverside County Treasurer dated April 17, 1930, wherein he advised:

"It is my opinion that you are required to pay any matured bond or interest coupon of any

bond of any of the three districts, from the Palo Verde Irrigation District Fund, so long as there is any money in that fund; bearing in mind, however, that money in that fund that was raised to pay the bonds or interest coupons of any of the various districts can be used only for such payment. It is my suggestion that you keep a subsidiary account, or accounts, which will enable you to segregate any bond or interest coupon money that comes into your hands, and see to it that such money is applied to the payment of the bonds or interest coupons to which it is applicable. If such funds prove inadequate to pay the bonds or interest coupons, then it is your duty, in my opinion, to use any money remaining in the fund, for the payment of any matured bond or the interest coupon of any bond."

No effort has been made in these proceedings on the part of petitioner to show what trust properties and funds it has belonging to the several districts whose bonds are involved. Yet it has been shown that all the *real* property within the Palo Verde Irrigation District has been sold and is held in trust by the Palo Verde Irrigation District for the various purposes of the districts.

The judgments against the Drainage and Levee Districts, the several liability of these districts, the negligence of the County of Riverside, the right to personal property tax, and the existence of trust property render it inequitable that a decree discharging the trustee, the officers of the Palo Verde Irrigation District, and the three other State agencies from further liability be rendered.

TWELFTH PROPOSITION: THE DISTRICT IS NOT AUTHORIZED BY LAW TO CARRY OUT THE PLAN.

Assignment of Error No. 10 reads:

> "The court erred in finding * * * that petitioner is authorized by law to take all action necessary to carry out the plan * * *"

The Act requires this finding:

The Supreme Court in the *Bekins* case said this provision referred to state law.

The petitioner is not so authorized because:

1. The State has not consented.

2. The Districts Securities Commission has not approved the plan adopted May 10, 1938.

3. The authority of the R. F. C. to loan further expired in 1936.

4. The people voted on a plan in June, 1934, which is fully executed.

5. The R. F. C. resolution of 1934 contains provisions which the district cannot perform, e. g., a promise not to issue other bonds.

6. The plan of composition of May 10, 1938, is not shown to be authorized by the Board of Trustees.

THIRTEENTH PROPOSITION: THE STATE HAS NOT GIVEN ITS CONSENT.

Assignment of Error No. 30 reads:

> "The court erred in holding that petitioner and its obligations are subject and amenable to the bankruptcy power of the Congress of the United States, and in holding that the State of California has consented and can consent to this proceeding, and in not holding that any purported consent of the State of California to this proceeding under the terms and provisions of California Statutes of 1934 (Extra session) Chapter 4 is unconstitutional and void in that said chapter violates the provisions of Article I, Section 16; Article IV, Section 1; Article X, Section 5; and Article XIII, Section 6 of the Constitution of the State of California, and Article I, Section 10, Clause 1 of the Constitution of the United States, and other constitutional provisions."

In the *Bekins* case Mr. Chief Justice Hughes said with reference to the question of state consent, concerning that Court's opinion that the state had given its consent:

> "we have not been referred to any decision to the contrary."

thus giving the possibility of re-examination of that question.

The Act, which was before the Supreme Court then was Cal. Stats. 1934 (Ex. Sess.), Chapter 4. This Act has been repealed by Cal. Stats. 1939, Chapter 72

since this appeal was taken. The question is, therefore, upon the effectiveness of the repealing of that Act and the consent it purports to give. The State of California by its Constitution prohibits the impairment of contract by its legislature, California Constitution, Article I, Section 16. Such consent is also an unlawful delegation of judicial power in violation of Article VI, Section 1 of the California Constitution, and of the Tenth Amendment of the Constitution of the United States. See, also, *Duffy v. Hobson,* 40 Cal. 240; *Ex parte Knowles,* 5 Cal. 300; *Pacific Coast Casualty Co. v. Pillsbury,* 171 Cal. 319.

It is also an attempted surrender of the power of taxation contrary to Article XIII, Section 6 of the California Constitution, providing that the power of taxation should never be surrendered or suspended by any grant or contract to which the State shall be a party. (*Illinois Central R. R. Co. v. State of Illinois,* 146 U. S. 387, 13 S. Ct. 110; *U. S. v. Constantine,* 56 S. Ct. 223, 296 U. S. 287; *Board of Commissioners v. State* (Okla.), 257 Pac. 778; *Nelson v. Pitts* (Okla.), 259 Pac. 533.) Where the Court held invalid a statute which provided for a sale of property for tax liens and release of the property from all liens after the sale of such property and said:

> "And to the same extent which said Chapter 212 S. L. 1923 tends to impair the obligation of contracts and extinguish vested rights, it also tends to restrict the power of the state to levy and collect taxes and to extinguish obligations due the state * * *"

It is an attempted taking of private property for the payment of public debt in violation of Article XI, Section 15 of the California Constitution.

Finally, it is an unlawful interference with trust obligations. *Provident Land Corporation v. Zumwalt*, 96 C. D. 497, 85 Pac. (2d) 116, at 120, where the Court said:

> "* * * the lands remain in trust, and the district exercises its powers, however broad, as a trustee."

Furthermore, this property is exempt from execution as held in the case of *El Camino Irrigation District v. El Camino Land Corporation*, 96 C. D. 505, 508, 85 Pac. (2d) 123. Property exempt from execution is not subject to bankruptcy, yet we have the anomalous situation that this very land which is exempt from execution is trust property belonging to the bondholders. (*McKaig v. Moutrey*, supra.) It is submitted that no public trustee can take advantage of the bankruptcy act.

FOURTEENTH PROPOSITION: THE ACT IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE FEDERAL CONSTITUTION.

Assignment of Errors Nos. 39, 40, 41, and 31.

No. 39 reads: "The court erred in not holding that the plan of composition violates the Fifth amendment of the Constitution of the United States in that mortgages and other obligations, junior to those held by appellants, of petitioner, and petitioner's landowners may be paid in full

while appellants are to receive only 24.81 per cent of the principal of their holdings."

Assignment of Error No. 40 reads: "The plan further violates the Fifth Amendment of the Constitution of the United States by taking appellants' property and giving it to the landowners of petitioner's district."

Assignment of Error No. 41 reads: "The plan takes the private property of appellants to pay the public debt of the State of California, and of the County of Riverside and Palo Verde Irrigation District without just compensation."

Assignment of Error No. 31 reads: "The court erred in not holding that said Chapter IX (formerly Chapter X) of the Bankruptcy Act was and is unconstitutional and that it did not violate the following sections and clauses of the Constitution of the United States: Article I, Section 10, Clause 1, and the Fifth and Tenth Amendments."

At the time of the decision in the *Bekins* case, although it was argued that the functions of a California Irrigation District were strictly governmental, there was no final and clear decision by our Courts upon that subject. Since that time, however, the decision in the case of *El Camino Irrigation District v. El Camino Land Corporation,* 96 Cal. Dec. 505, 85 Pac. (2d) 123, and of *Anderson-Cottonwood Irrigation District v. Klukkert,* 97 C. D. 348, 88 Pac. (2d) 685, have come down, finally determining that all of the functions of an irrigation district are *exclusively governmental.* Since, therefore, the constitutionality

of Chapter IX rested in the *Bekins* case in large part upon two propositions, first non-interference with governmental functions and second consent of the State, we take it that the question of constitutionality of the Act as affecting appellants' rights should be re-examined in the light of these decisions by the California Supreme Court, relying upon the decision in the *Erie Railroad* case already discussed above.

Furthermore, in the *Bekins* case, the question of the violation of the Fifth Amendment was only before the Court in the sense of statutory violation. Now we have the *facts* and *merits* of the plan before the Court, from which it is primarily seen that the rule in the *Boyd* case, supra, is violated in that property of the senior creditor is taken and given to a junior without just compensation; and that the State now seeks to take property of the public bondholder without compensation, and takes that property to pay the state's debt; and in that the legislation is class legislation and discriminatory for inasmuch as it benefits the other debts of the same sovereign, namely, the bonds of the County of Riverside and the City of Blythe, and private mortgages on property, and increases the value of private property rights in land and buildings within the districts.

CONCLUSION.

Four other cases involving somewhat the same issues as this case, namely, *Lindsay-Strathmore Irrigation District, Merced Irrigation District, Corcoran Irrigation District* and *James Irrigation District,* are on appeal to this Court. The *Lindsay* case has been docketed and in all probability will be argued on the same calendar as this case. Several other cases involving bankruptcy petitions of irrigation districts are pending in the District Courts in California, and consequently the instant case assumes considerable importance.

As Chief Justice Terrell said in *Klemm v. Davenport,* 129 So. Rep. 904:

> "In times of stress and adversity, individuals are often required to toil through years and exercise the most rigid economy to 'pay', even though the business engaged in proved a failure. A like course of conduct is no less incumbent on a governmental entity. The very foundation of our social and economic structure is confidence, and while the demands of government on the taxpayers are burdensome, it is also true that society in turn is making unusual demands on the government. If a 'promise to pay' is no more than a 'scrap of paper', or like the apples of Sodom, fair to look on, but turn to smoke and ashes when plucked or matured, then government must cease to function and confidence becomes a mere tradition and is no longer the rock on which human relations under our form of government must rest."

We respectfully submit, based upon the points and arguments, that the decree of the District Court should be reversed.

If the decree be reversed, the district will have been 96% refinanced anyway, for all the district owes the R. F. C. is one million, not four million, dollars.

Dated, Turlock, California,
July 12, 1939.

Respectfully submitted,
W. Coburn Cook,
Chas. L. Childers,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

IRRIGATION DISTRICT REFINANCING ACT.

(1937 CAL. STATS., CHAPTER 24.)

An act providing ways and means for liquidating, refinancing and readjusting certain indebtedness of irrigation districts in default; for judicial proceedings to carry out such purpose; for the confirmation of plans for liquidation, refinancing and readjustment; authorizing the exercise of the police power and the power of eminent domain for the acquisition and cancellation of obligations of districts held by persons not accepting such plant; declaring an emergency and the urgency hereof and providing that this act shall take effect immediately.

[Approved by the Governor March 30, A. D. 1937.]

The people of the State of California do enact as follows:

SECTION 1. Legislative Statement and Declaration of Fact, Emergency and Policy. The Legislature of the State of California does hereby find, determine and declare to exist a State emergency affecting the peace, health, safety and comfort of the people, caused by and resulting from the inability of irrigation districts formed, organized and existing under the laws of this State to consummate and complete plans for liquidating, refinancing or readjusting indebtedness of such districts, and that such emergency arises out of the following facts, to wit:

That many of such districts were organized during a rapid period of expansion and inflated values and that they issued bonds in excess of their capacity to pay. That during the period of world-wide depression many of these districts became increasingly unable to meet the obligations of their bonded indebtedness, including the payment of interest thereon, and that mounting defaults in such districts with consequent pyramiding of assessments to the point of confiscation, ever increasing delinquencies and inability to sell lands foreclosed by the districts caused a condition of chaos to exist which resulted in the enactment of Chapter 60 of the Statutes of 1933 and Chapter 36 of Statutes of 1935, commonly known as "Section 11 of the District Securities Commission Act". That this act authorized, subject to the provisions thereof, the levy of assessments during the period of the emergency thereby declared to exist, based upon the ability of the land to pay and contemplated that, with such relief, ordinary economic processes would permit such districts to rehabilitate themselves through enabling them and the bondholders in agreement to work out refinancing plans before all values within such districts should be destroyed. That after the passage of said acts districts levied assessments based on the ability of lands to pay, and commenced proceedings to work out refinancing plans with their respective bondholders. That in many of such districts refinancing plans have heretofore been accepted by an overwhelming majority of the bondholders and proceedings have been brought under

section 80 of the Bankruptcy Act of the United States to compel acceptance of such refinancing plans by small minority groups of dissenting bondholders. That recently the Supreme Court of the United States has held that such section of the Bankruptcy Act is unconstitutional in that it infringes upon the sovereignty of the States. That as a result of this decision there is now no legal procedure by which refinancing of the present bonded indebtedness of such districts may practicably be consummated. That the excessive debt burden of such districts has so increased and pyramided during the last three years, due to the inability to meet the annual debt obligations, that any present attempt to levy assessments designed to meet such obligations of such districts in full would result in overwhelming delinquencies, would prove largely uncollectible, would raise no adequate funds for bond or other debt service, and would be of no benefit to bondholders or creditors. That, unless these existing chaotic conditions are remedied, in each succeeding year an ever increasing body of lands will default in payment of assessments and will remain unredeemed therefrom. That annual assessments in each succeeding year will fall upon a progressively lessening body of land which in turn will be forced to default in greater and greater quantities. That such inevitable and wholesale conditions of default will destroy the ability of such districts to pay their bonded debts in whole or in part and to carry out the necessary public functions with which they are entrusted as governmental agencies of the State. That

on the contrary if refinancing plans now under way and accepted by overwhelming majorities of the bondholders of such districts can be effected, bondholders and creditors will be benefited, land in the districts will remain in private ownership, values will be restored and such districts will be enabled to discharge their public obligations. That the adequate credit, support and maintenance of such districts as governmental agencies of the State is a matter of vital State interest and concern; that the welfare of the State, the solvency of its banking institutions and the interests of the propery owners in, and the creditors of, such districts, all require the speedy settlement and adjustment of the debt defaults of all such districts so that the financial standing, credit and tax collecting ability thereof may be restored. Therefore, to meet this condition of emergency, the police power and the power of eminent domain are hereby invoked and such irrigation districts herein referred to are hereby authorized to institute and maintain the proceedings and actions as hereinafter set forth which are hereby declared to be for public purposes, for the preservation of government, the protection of private property and the protection of the bondholders, creditors and property owners alike of such districts to the end that the State shall aid in and assist in the solution and settlement of grave, economic and financial difficulties by providing ways and means for liquidating, refinancing and readjusting indebtedness of such irrigation districts as hereinafter set forth. This act is hereby declared to be an urgency

measure necessary for the immediate preservation of the public peace, health and safety within the meaning of section 1 of Article IV of the Constitution and shall therefore go into effect immediately. That a statement of the facts constituting such necessity is as hereinbefore set forth in this section.

SEC. 2. Application. The outstanding bond or warrant indebtedness or both or any class or classes thereof of any irrigation district organized and existing under the laws of this State and in default as to payments of principal or interest or both of any such indebtedness for a period of not less than three (3) years, or unable to pay its debts as they mature, may be liquidated, refinanced or readjusted as hereinafter provided.

SEC. 3. Acceptance of Plan by Bondholders and Warrant Holders Affected and by District. Proceedings under this act shall be instituted, except as hereinafter provided, by the adoption by the board of directors of any such district of a plan of liquidation, refinancing or readjustment of such indebtedness, or any class thereof, which plan shall theretofore have been accepted in writing or by contract by the holders of not less than two-thirds in principal amount of each class of the indebtedness affected thereby other than bonds or warrants owned or held by such district. For the purpose of accepting such plan and for all other purposes of this act, any holder of such indebtedness may act in person or by a duly authorized agent or committee. Such plan may provide for cash payments to creditors affected thereby or

include provisions modifying or altering the rights of such creditors either through the issuance of new securities of any character, or otherwise, and may contain such other provisions or agreements not inconsistent with this act as the parties may desire. No creditor shall be deemed to be affected by the plan (a) whose bonds or warrants are not affected by the plan or (b) if the plan makes provision for the payment of his bonds or warrants in cash in full.

Sec. 4. Approval by District, California District Securities Commission and Petition. Such plan shall be thereafter presented by the board of directors of any such district to the California District Securities Commission, and, if approved by such commission as being fair and equitable to the creditors affected thereby and for the best interests of such district and the landowners thereof, the board of directors may file in the Superior Court in and for the county in which such district, or the major part thereof, is located, a verified petition stating that such district is unable to meet such obligations as they mature; that it desires to effect the aforesaid plan, which said plan is filed and submitted with the petition or described therein and which said plan has been accepted by creditors as above mentioned; that such district desires to avail itself of the relief and remedies provided for by this act; and containing such other allegations as may be deemed material. Any such petition shall be accompanied by a certified copy of the resolution of the board of directors of said district adopting said plan, together

with a list of all known holders of bonds and warrants of said district to be liquidated, refinanced or readjusted as aforesaid, with their addresses so far as known to the district and a description of their respective claims so far as is known which said list shall further show separately those holders of bonds and warrants of said district who have, and who have not accepted the plan.

SEC. 5. Automatic Stay. Plan Temporarily in Effect. The filing of such petition shall operate automatically to enjoin and stay, pending final determination of the proceedings as herein set forth, the commencement or continuance of suits or proceedings against the district or any officer or board of directors thereof which would interfere with or prevent the carrying out of the plan, and shall also operate automatically to enjoin and stay the enforcement of any lien or the levy of assessments except in so far as is consistent with and in furtherance of such plan. The court in which said petition is filed shall have exclusive jurisdiction with respect to all suits, actions and proceedings against the district filing such petition or any board of directors or officer thereof on account of the indebtedness of such district proposed to be liquidated, refinanced or readjusted by such plan or to enforce any lien or the levy of any assessments for the payment of such indebtedness and all matters incidental and collateral thereto and it shall be deemed that said plan is temporarily in full force and effect. It is hereby found and declared that proceedings for or the issuance or enforcement of a writ of

mandate or other action or proceeding to enforce any lien or to enforce the levy of assessments for the payment of such indebtedness other than as provided in such plan would, during pendency of said proceeding, result in disorder and confusion and destruction of joint, relative and correlative rights of creditors affected by said plan and injury of third persons.

SEC. 6. Notice. Upon the filing of such petition the court shall set a time and place for the hearing thereof not less than ninety (90) days thereafter and the district shall give notice of said hearing as follows: Not less than thirty days' written notice of the time and place of hearing shall be personally served upon all known holders of bonds and warrants affected by the plan who are residents of the State of California and who have not theretofore accepted such plan in writing and who can be located by due diligence for such service. If such nonaccepting holders are nonresidents but are represented in mandamus suits or other litigation relating to said bonds or warrants pending in said county or in any court of California, or in the Federal courts in California, such notice may be served upon any attorney of record representing such nonresident holders and such service shall be deemed as effective as if made on such holders themselves. As to all nonaccepting holders resident or nonresident in the State of California and not personally served, the district shall publish such notice of hearing in a newspaper of general circulation published in the county in which such petition is filed at least once a

week for eight (8) successive weeks, the last publication to be not less than thirty (30) days prior to the date set for the hearing. Such notice shall also be mailed at least thirty (30) days prior to the date set for the hearing to each nonaccepting holder, postage prepaid, to his last address as, and if the same appears on the records of the district. The notice shall state that the district has filed a petition for approval of a plan to liquidate, refinance or readjust its bonded indebtedness or some class or classes thereof and/or its outstanding warrant indebtedness; it shall give the name of the court and place where such action or proceeding is pending; shall state the plan generally; that it is submitted under this statute; and that it has been accepted by the holders of at least two-thirds in principal amount of each class of the indebtedness to be liquidated, refinanced or readjusted, shall refer to the petition on file and to this law for further particulars and shall state the time and place when said petition shall come on for hearing.

Sec. 7. Plans Heretofore Accepted by Creditors and the District. In any case meeting the requirements of sections 2 and 3 hereof and where prior to the effective date of this act the plan as therein provided has been accepted in writing by the holders of not less than two-thirds in principal amount of each class of the bond or warrant indebtedness affected thereby and by such district, and been approved by the California District Securities Commission, proceedings under this act may be directly

instituted, for all purposes hereof and without further proceedings, by the filing by such district of a petition in the form provided in section 4 hereof but also alleging that the plan submitted therewith was accepted as in this section provided.

SEC. 8. Hearing on Plan. Interlocutory Judgment Confirming Plan. Dismissal. At the time and place set by the court the hearing upon said plan shall be held by said court. Said hearing, may in the discretion of the court, be continued from time to time. At any time prior to such hearing, any creditor affected by the plan may file an answer to the petition accepting the plan or controverting any of the material allegations of the petition and setting up any objections to the plan. Upon the hearing the rules and laws of practice, procedure and evidence in civil actions generally shall prevail. The court shall hear the petition and such answers or objections as may be filed and such competent and material evidence as may be offered. At the conclusion of the hearing the court shall make written findings of fact, and its conclusions of law thereon and shall enter an interlocutory judgment confirming the plan if satisfied that (1) it is fair, equitable and for the best interests of the creditors affected thereby; (2) complies with the provisions of this act; (3) has been accepted or approved in writing or by contract by the holders of not less than two-thirds in principal amount of each class of the indebtedness affected thereby as provided in section 3 hereof; (4) the offer of the plan and its acceptance are in good faith;

and (5) the district is authorized by law to take all actions necessary to be taken by it to carry out the plan. If not so satisfied as above provided, the court shall enter a judgment dismissing the proceeding. In determining whether the plan is fair and equitable as hereinbefore provided, the court shall take into consideration, together with all other relative data, whether rights and remedies of the holders of the indebtedness affected by the plan are inefficacious, uncertain or futile and whether the plan is based substantially on the measure of the ability of the district to pay. Any interlocutory judgment confirming said plan shall be conclusive evidence (a) of the public necessity of the acquisition by such district as hereinafter provided of bonds or warrants owned by holders not accepting such plan (b) that the acquisition of such bonds or warrants is necessary for the purposes of this act and (c) that such acquisition is planned in the manner which will be compatible with the greatest public good and the least private injury.

SEC. 9. Changes, Amendments and Modifications of the Plan. Before a plan is confirmed, changes, amendments and modifications may be made in the plan with the consent of creditors who have already accepted it or, with the approval of the court after hearing, upon such notice to creditors affected as the court may direct. All changes, amendments or modifications shall be subject to the right of any creditor who shall previously have accepted the plan to withdraw his acceptance within a period to be fixed by

the court and after such notice as the court may direct, if in the opinion of the court, the amendment, change or modification will be materially adverse to the interest of such creditor. If any creditor having such right of withdrawal shall not withdraw within such period, he shall be deemed to have accepted the plan as amended, changed or modified; provided, however, that the plan as amended, changed or modified shall comply with sections 2 and 3 of this act and shall have been accepted in writing by the district. If an interlocutory judgment confirming the plan is entered, the court may prescribe a reasonable time and conditions for the delivery of the money, securities or other consideration to the creditors under the terms of the plan and may, from time to time, allow additional time for such delivery or may provide for the deposit of the money, securities or other consideration within such time or extension thereof with such depositary or disbursing agent as the court may appoint.

Sec. 10. Determination of Value and Acquisition and Cancellation of Warrants or Bonds of Nonaccepting Holders. At any time prior to the entry of the interlocutory judgment as hereinbefore provided, any holder of bonds or warrants affected by said plan may file written acceptance of such plan and thereupon shall be entitled to all of the benefits thereof. Upon rendition of the interlocutory judgment, all holders of bonds or warrants affected by the plan who shall not theretofore have accepted the plan, shall be deemed to be and will be hereinafter referred to as

"nonaccepting holders" and thereafter they shall have no right to accept said plan or to avail themselves of any rights thereunder. Upon rendition of said interlocutory judgment, the court shall continue the proceeding for final hearing with respect to the value of the bonds or warrants of the nonaccepting holders as hereinafter provided. At the time set for final hearing the court shall hear such competent and material evidence as may be offered and shall proceed to determine and fix the actual value of the bonds or warrants held by nonaccepting holders and each of them respectively. Such value shall be determined by a jury unless waived by the district and the nonaccepting holders, the value of whose bonds or warrants is being fixed and determined. The value shall be fixed and determined as of the date of the filing of the petition and shall be fixed and determined in view of all the rights and remedies available to the creditors affected if their obligations were not liquidated, refinanced or readjusted and if they were relegated to their legal and equitable rights and remedies under their bonds or warrants. The intent of the Legislature herein is that the nonaccepting bond or warrant holder shall receive the full cash value of his bonds or warrants fixed and determined by conditions as they would be if the district indebtedness were not liquidated, refinanced or readjusted according to the plan approved by the court, but such values shall not be enhanced or increased by reason of any value given to bonds or warrants held by nonaccepting holders by reason of the fact that

two-thirds or more in principal amount of the creditors affected by the plan have agreed on a plan of liquidation, refinancing or readjustment or that the court has confirmed the same or that said plan has already been carried into effect in whole or in part as to accepting creditors or any of them. Evidence concerning the market value of the bonds and warrants affected by the plan and the price at which they were sold on the market, and otherwise, prior to the adoption by the district of the plan, and for a reasonable time before and after such date shall be admissible.

SEC. 11. Judgment of Acquisition, Cancellation and Condemnation. After determining the value of the bonds or warrants owned by the nonaccepting holders as aforesaid, the court shall enter a judgment of acquisition, cancellation and condemnation by said district of all bonds or warrants of nonaccepting holders for the price and at the value fixed and determined as aforesaid. After entry of the judgment as in this section provided, the district may deposit with a depositary or disbursing agent appointed by the court for the respective nonaccepting holders of bonds or warrants, the full appraised value of such bonds or warrants as fixed and determined in said judgment, together with interest at the rate of seven per cent (7%) per annum from the date of such judgment to the date of deposit in lawful money of the United States and thereupon it shall be deemed that said bonds or warrants owned by such nonaccepting holders have been finally acquired and condemned by said dis-

trict and are canceled and extinguished. Any nonaccepting bond or warrant holder may at any time withdraw the money so deposited with the depositary or disbursing agent in cancellation of his bonds or warrants respectively upon surrender to said depositary or disbursing agent of such bonds or warrants; provided, further, that the district must, on demand of any nonaccepting bond or warrant holder, deposit with such depositary or disbursing agent within not less than three months from date of entry of the judgment provided for in this section, the full amount fixed by said judgment for such nonaccepting holder respectively, together with interest as aforesaid, on condition that said creditor's demand shall be accompanied by tender for cancellation of the bonds or warrants referred to in said demand; and provided further that in any event the district must, within three months after the judgment provided for in this section shall have become final, deposit with the depositary or disbursing agent appointed by the court the sums of money fixed and determined by such judgment for all nonaccepting holders of bonds or warrants respectively, together with interest as aforesaid.

Sec. 12. Binding Effect of Interlocutory Judgment and Judgment Fixing Value of Bonds or Warrants of Nonaccepting Holders. The plan when confirmed by interlocutory judgments as provided in section 8 hereof shall be binding upon the district and all holders of bonds or warrants who have accepted the same as herein provided and the district and such accepting bondholders shall have no other or different

rights with respect to their bonds or warrants than are provided in such plan and the interlocutory judgment confirming the same. From and after the entry of the judgment provided for in section 11 hereof, the nonaccepting holders shall have no right other than to receive the cash value fixed for their bonds or warrants respectively, together with interest as hereinbefore provided.

Sec. 13. Procedure After Disbursement to Nonaccepting Holders. After the district has deposited with the depositary or disbursing agent appointed by the court the value of the bonds or warrants of the nonaccepting holders respectively as hereinbefore provided, and after any nonaccepting bond or warrant holder has received the value of his bonds or warrants as fixed by said judgment aforesaid, together with interest as aforesaid, by delivering such bonds or warrants to such depositary or disbursing agent, said bonds and warrants shall thereupon be delivered by such depositary or disbursing agent to the district for cancellation. Any funds deposited with the depositary or disbursing agent by the district and not paid to nonaccepting bond or warrant holders hereunder, shall remain with such depositary or disbursing agent for five years after said judgment has become a finality and thereupon if not paid out as hereinbefore provided shall be returned to the district as unclaimed and the bonds or warrants represented thereby shall be deemed extinguished and canceled. All fees or other expenses of the depositary or disbursing agent hereunder shall be paid by the district.

Sec. 14. The District May Borrow Money to Acquire Nonaccepting Bonds or Warrants. In order

to fully carry out the purposes of this act, the district is hereby authorized to borrow from accepting holders of bonds or warrants, or otherwise, on such terms as may be agreed upon and approved by the court, any or all funds needed for the purpose of deposit for compensation to nonaccepting holders as above provided.

SEC. 15. Further Orders of the Court. At the time of entry of judgment as hereinbefore in section 11 provided, the court shall further permanently restrain and enjoin holders of bonds or warrants affected by said plan or said judgment from instituting or further maintaining suits, actions or proceedings to enforce alleged rights or remedies other than by this act or said plan or said interlocutory judgment confirming the same is specifically granted or provided. The court may also enter judgment or order for declaratory relief in conformity with proper allegations of the petition to that end pursuant to sections 1060, 1061, 1062 and 1062a of the Code of Civil Procedure of the State of California.

SEC. 16. Appeals. An appeal may be taken by the district from any judgment or order dismissing the proceedings or by or on behalf of any creditor aggrieved from either the interlocutory judgment provided for in section 8 hereof or from the judgment fixing and determining the value of nonaccepting bonds or warrants as provided in section 11 hereof. Such appeal may be taken in the manner and as provided by law for appeal from final judgment in an equity case.

SEC. 17. Termination of Act. This act shall remain in effect only until the first day of February,

1939, provided that any district which prior to such date shall have adopted the plan as herein provided and secured the acceptance of the creditors affected thereby as herein provided and which has also complied with the provisions of section 4 hereof, may nevertheless maintain and prosecute said proceeding to a finality. Such proceeding must confirm throughout to the requirements and provisions of this act.

Sec. 18. Saving Clause. If any section, sentence, clause or part of this act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed this act and each section, sentence, clause and part thereof despite the fact that one or more sections, sentences, clauses or parts thereof be declared unconstitutional.

Sec. 19. Consent of Accepting Bond or Warrant Holders Not Affected by Invalidity of any Portion of this Act or Dismissal of Petition. In the event that said petition for liquidation, refinancing or readjustment is dismissed, or that any of the provisions hereof for confirmation of the plan or acquisition of the bonds or warrants of the nonaccepting holders shall be declared invalid, such dismissal or declaration shall not affect the effectiveness of the plan with respect to the district or holders of bonds or warrants accepting the same.

Sec. 20. Short Title. This act may be known and cited as "Irrigation District Refinancing Act."

Sec. 21. Conflicting Acts Repealed. All acts or parts of acts in conflict with this act are hereby repealed.

PORTIONS OF STATUTES RELATING TO PALO VERDE DRAINAGE DISTRICT.

CHAPTER CCXXXVIII.

An act to provide for the organization and government of drainage districts, for the drainage of agricultural lands other than swamp and overflowed lands, and to provide for the acquisition or construction thereby of works for the drainage of the lands embraced within such districts.

[Approved March 20, 1903.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Whenever fifty or a majority of the holders of title, or evidence of title as herein provided, to agricultural lands other than swamp and overflowed lands, which are susceptible of one general mode of drainage by the same system of works, desire to provide for the drainage of such lands, they may propose the organization of a drainage district under the provisions of this act, and when so organized, such district shall have the powers, rights, and duties conferred, or which may be conferred by law, upon such drainage districts. The equalized county assessment roll next preceding the presentation of a petition for the organization of a drainage district under the provisions of this act, shall be sufficient evidence of title for the purposes of this act; *provided,* that no person who has received or acquired title to land within such proposed district for the purpose of enabling him or her to join in such petition or to become an elector of said district, shall be allowed to sign such petition or to vote at any election to be held in such district under the provi-

sions of this act. Such illegal signing, however, shall not invalidate such petition when there shall be found a sufficient number of other legal petitioners.

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SEC. 14. The board shall have the power and it shall be their duty, to manage and conduct the business and affairs of the district; make and execute all necessary contracts; to adopt a seal for the district to be used in the attestation of proper documents; provide for the payment, from the proper fund, of all the debts and just claims against the district; employ and appoint when necessary, engineers to survey, plan, locate, and estimate the cost of the works necessary for drainage and the land needed for right of way, including drains, canals, sluices, water-gates, embankments and material for construction, and to construct, maintain, and keep in repair all works necessary for the purpose of drainage. The board and its agents and employés shall have the right to enter upon any land to make surveys, and may locate the necessary drainage works and the line for any canals, sluices, water-gates and embankments, and the necessary branches for the same, on any lands which may be deemed best for such location. Said board shall also have the right to acquire, hold and possess either by donation, purchase or condemnation, any land or other property, necessary for the construction, use, maintenance, repair, and improvement of any works required for the purpose of drainage as provided herein. The board may establish equitable by-laws, rules and regulations necessary or proper for carrying on the business herein contemplated, and generally may perform all such acts as

shall be necessary to fully carry out the purposes of this act.

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SEC. 26. The legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such drainage district, and shall be held by such district in trust for and is hereby dedicated and set apart to the uses and purposes set forth in this act. And said board is hereby authorized and empowered to hold, use, acquire, manage, occupy, and possess said property as herein provided. The said board is hereby authorized and empowered to take conveyances or other assurances for all property acquired by it under the provisions of this act, in the name of such drainage district, to and for the uses and purposes herein expressed, and to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this act, or to enforce, maintain, protect, or preserve any and all rights, privileges and immunities created by this act, or acquired in pursuance thereof. And in all courts, actions, suits, or proceedings, the said board may sue, appear, and defend in person or by attorneys, and in the name of such drainage district.

SEC. 27. For the purpose of constructing necessary conduits, drains, sluices, water-gates, embankments and all works necessary for the purpose of drainage, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act, the board of directors of any such district must,

as soon after such district has been organized as may be practicable, and also whenever thereafter the construction fund has been exhausted by expenditures as herein authorized therefrom, and it is necessary to raise additional money for said purposes, estimate and determine the amount of money necessary to be raised. And thereafter said board shall immediately call a special election, at which shall be submitted to the electors of such district the question whether or not the bonds of said district shall be issued in the amount so determined. Notice of such election must be given by posting notices in three public places in each election precinct in said district for at least twenty days, and also by publication of such notice in some newspaper published in the county where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notices must specify the time of holding the election, the amount of bonds proposed to be issued; and said election must be held and the result thereof determined and declared in all respects as nearly as practicable in conformity with the provisions of this act governing the election of officers; *provided,* that no informalities in conducting such an election shall invalidate the same, if the election shall have been otherwise fairly conducted. At such election the ballots shall contain the words "Bonds—Yes" or "Bonds —No," or words equivalent thereto. If a majority of the votes cast are "Bonds—Yes," the board of directors shall cause bonds in said amount to be issued; if a majority of the votes cast at any bond election are

"Bonds—No," the result of such election shall be so declared and entered of record. Whenever thereafter, a petition of the character hereinbefore provided for in this section, is presented to the board, it shall so declare of record in its minutes, and shall thereupon submit such questions to said electors in the same manner and with like effect as at such previous election.

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SEC. 30. Any bonds issued under the provisions of this act shall be a lien upon the property of the district and the lien for the bonds of any issue shall be a preferred lien to that for any subsequent issue. Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district; and all the real property in the district shall be and remain liable to be assessed for such payments as hereinafter provided.

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SEC. 42. The board of supervisors of each county wherein is situated a district or any part thereof organized under the provisions of this act, must, annually, at the time of levying county taxes, levy a tax to be known as the "——— (name of district) drainage district tax," sufficient to raise an amount reported to them as herein provided, by the board of directors. The supervisors must determine the rate of such tax by deducting fifteen per cent for anticipated delinquencies from the total assessed value of the real property of the district within the county as it appears on the assessment roll of the county, and then dividing the sum reported by the board of directors as required

to be raised by the remainder of such total assessed value.

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Sec. 44. The provisions of the Political Code of this state prescribing the manner of levying and collecting taxes and the duties of the several county officers with respect thereto, are, so far as they are applicable and not in conflict with the specific provisions of this act, hereby adopted and made a part hereof. Such officers shall be liable upon their several official bonds for the faithful discharge of the duties imposed upon them by this act.

Sec. 45. If the district is in more than one county, the treasury of the county wherein the district was organized shall be the repository of all the funds of the district. For this purpose the treasurers of any other counties wherein is situated a portion of said district, must, at any time, not oftener than twice each year, upon the order of the board of directors, settle with said board and pay over to the treasurer of the county where the district was organized, all moneys in their possession belonging to the district. Said last-named treasurer is authorized and required to receive and receipt for the same, and to place the same to the credit of the district. He shall be responsible upon his official bond for the safe-keeping and disbursement, in the manner herein provided, of these and all other moneys of the district held by him.

Sec. 46. The following funds are hereby created and established, to which the moneys properly belong-

ing shall be apportioned by the treasurer, to wit: Bond fund, construction fund, general fund, funding fund.

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Sec. 48. Upon the presentation of the coupons due, to the treasurer, he shall pay the same from the bond fund. Whenever said fund shall amount to the sum of ten thousand dollars in excess of an amount sufficient to meet the interest coupons due, the board of directors may direct the treasurer to pay such an amount of said bonds not due as the money in said fund will redeem, at the lowest value at which they may be offered for liquidation, after advertising in the manner hereinbefore provided for the sale of bonds, for sealed proposals for the redemption of said bonds. Said proposals shall be opened by the board in open meeting, at a time to be named in the notice, and the lowest bid for said bonds must be accepted; *provided,* that no bond shall be redeemed at a rate above par. In case the bids are equal, the lowest numbered bond shall have the preference. In case none of the holders of said bonds shall desire to have the same redeemed, as herein provided for, said money shall be invested by the treasurer, under the direction of the board, in United States bonds, or the bonds of the state, which shall be kept in said "bond fund" and may be used to redeem said district bonds whenever the holders thereof may desire.

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Sec. 57. The rights of way, ditches, drains, conduits, flumes, pipe lines, dams, reservoirs, pumping plants, and other property of like character belonging to any

drainage district shall not be taxed for state and county or municipal purposes.

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Sec. 90. In case there be outstanding bonds of any district desiring to take advantage of the provisions of sections 88 and 89 of this act concerning reduction of bonded indebtedness, the assent of such bondholders may be obtained to such reduction of the bonded indebtedness, in the same manner as provided in section sixty-nine of this act. If such assent is obtained in the manner therein provided, then, and in that event, such district shall be empowered to take advantage of all the provisions of said sections of this act, but not otherwise. No reduction of the bonded indebtedness, as in this act provided shall in any manner affect any order of court that may have been made, adjudicating and confirming the validity of said bonds.

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PORTIONS OF STATUTE RELATING TO PALO VERDE JOINT LEVEE DISTRICT OF RIVERSIDE AND IMPERIAL COUNTIES, CALIFORNIA.

CHAPTER CCCX

An act to provide for the formation of levee districts in the various counties of this State and to provide for the erection of levees, dikes and other works for the purpose of protecting the lands within such districts from overflow and to levy assessments to erect and construct and maintain such levees, dikes and other works and to pay the necessary costs and expenses of maintaining said districts.

[Approved March 20, 1905.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Whenever the board of supervisors of any county in this state shall receive a petition signed by a majority of the land owners within any portion of said county, accompanied by a deposit sufficient to cover the cost of publication of all notices required by the first two sections of this act, which said portion of said county shall be specifically described and set out by metes and bounds in said petition, asking that said portion of said county be set apart and erected into a levee district for the purpose of protecting the lands embraced in said portion of said county from overflow from any river, stream or streams, of water course, the board of supervisors shall pass a resolution signifying its intention to erect and set apart said portion of said county into a levee district, for the

purpose of protecting the lands therein from overflow and describing the exterior boundaries of the district of lands embraced therein and to be assessed to pay the damages, costs and expenses thereof. Such resolution shall also contain a notice to be published, which said notice shall be headed "Notice of intention of the board of supervisors to form a levee district," and shall state the fact of the passage of such resolution, with the date thereof, the boundaries of the district, and the statement that it is proposed to assess all properties embraced within such proposed levee district for the purpose of paying the damages, costs and expenses of erecting and repairing dikes, levees and other improvements to protect the said lands from overflow, and the necessary expenses of maintaining the said district and refer to the resolution for further particulars. Such notice to be given by the board of supervisors and signed by its clerk.

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Sec. 10. At the time when by law it is the duty of the board of supervisors of such county to fix the annual tax rate for such county, the said board of supervisors, taking as a basis the last previous report of the commissioners as hereinbefore specified, and adopted by them, for the amount of moneys necessary to be raised in said district for the purposes thereof for that year, and the valuation of the lands and improvements thereon within such district as furnished them by the county assessor, must levy a tax upon all taxable property in such levee district sufficient to raise the amount set forth in the report as made

by said commissioners and adopted by said board of supervisors. The rate of taxation shall be ascertained by deducting fifteen per cent for anticipated delinquencies from the aggregate value of the lands and improvements thereon in said district, as shown by the statement prepared and furnished to the said board of supervisors by the assessor as herein before provided, and then dividing the sum necessary to be raised in said levee district by the remainder of such aggregate assessed value as shown in said statement as furnished by said assessor. The taxes so levied shall be computed and entered on the assessment roll by the county auditor, and collected at the same time and in the same manner as state and county taxes; and when collected shall be paid into the county treasury for the use of the said levee district in which said taxes was levied. And all taxes so levied as hereinbefore provided shall be a lien upon the lands and properties in said district in the manner and with the same effect, and collected in the same way as are state and county taxes.

Sec. 11. All moneys collected from such district for such taxes, and all moneys received from any source for the benefit of such district shall be by the county treasurer placed in a fund to be called the "——— levee district fund;" and all payments of any of the expenses of the work of improvements or other expenses of such district shall be made upon warrants drawn by the county auditor upon said fund, and paid by said treasurer, and all claims as well for the land and improvements taken or damages, as for the

charges and expenses, shall be paid as are other claims against the county and upon order of the board of supervisors, and the claims shall be itemized in the same manner as are other claims against the county.

SEC. 12. The board of supervisors of such county shall have the same supervision and the same control, and exercise the same authority, over the affairs and property of such district as are given to the said board of supervisors by law over the property and affairs of the county. No levees, dikes, or other works must be constructed or repaired except on the order of the board of supervisors, and when such repair or construction will exceed the sum of $500.00 the same must be repaired or constructed under a contract let after reasonable notice given by the said board of supervisors, by publishing said notice at least once a week for two weeks in a newspaper published and circulated in said county, and designated by said board. All bids shall be sealed; and shall be opened at the time specified in the notice, and the contract awarded to the lowest responsible bidder. The board may, however, reject any and all bids. The contract and bond for its performance must be entered into and approved by the board of supervisors; *except, however,* in cases of great emergency, by the unanimous consent of the whole board they may proceed at once to replace or repair any and all levees, dikes, or other works of whatever nature, without notice. Prior to the publication of the notice of the letting of any contract for the erection or repair of dikes, levees or other works the board of supervisors must cause to

be prepared by a competent engineer, plans, specifications, and working details of such work, which said plans and specifications shall be adopted by the board of supervisors and filed in the office of the clerk of said board, and shall be subject to inspection by any person for at least two weeks prior to the date of the letting of such contract. The board of supervisors must appoint an engineer to superintend the construction, repair or other work to be done under such plans and specifications and no claims shall be allowed for any work done under any contract let under such plans and specifications without a certificate being first filed in the office of the clerk of the board of supervisors signed by said engineer certifying that such work has been completed and constructed according to such plans and specifications, and the terms of the contract; such engineer shall be paid such compensation as may be agreed upon by said board of supervisors and such compensation shall be paid in the same manner as other claims against said district.

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CHAPTER 139.

An act authorizing levee districts of the state to incur a bonded indebtedness for the purpose of building, constructing, or repairing levees of the district; or for excavating and constructing ditches or canals of such districts; or for the purpose of acquiring rights of way for any such levees, ditches, or canals; or for any and all of said purposes.

[Approved March 8, 1911.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Any levee district formed or organized by or under the laws of California, may incur a bonded indebtedness for the purpose of building, constructing, or repairing the levee or levees of such district; or in excavating or constructing any ditches or canals of such district; or for the purpose of acquiring rights of way for any such levee, or ditches, or canals; or for any and all of said purposes. Such indebtedness shall be incurred in the following manner, to-wit:

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SEC. 7. The board of trustees or directors of such levee district shall, by order entered upon the minutes of said board, specify the amount of bonds which it is proposed to issue, which, in any case, shall not exceed the entire estimate of the expense of the work as planned, the rate of interest to be paid and the number of years, not exceeding twenty, the whole or any part of said bonds are to run; and said order shall further

provide for submitting the question of the issuance of said bonds to the taxpayers of the district, at an election to be called by the board for that purpose, and the words to appear upon the ballot shall be: "Bonds—Yes" and "Bonds—No," or words of similar import, together with a general statement of the amount and purpose of the bonds to be issued. Said order shall name a time and place of holding such election, which place shall be at some convenient place in the district.

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SEC. 9. The board of directors or trustees shall cause to be assessed and levied each year upon the assessable property of the district, in addition to the levy authorized for other purposes, a sufficient sum to pay the interest on outstanding bonds, issued in conformity with the provisions of this act, accruing before the next annual levy, and such proportion of the principal, that at the end of five years the sum raised from such levies shall equal at least twenty per cent of the amount of bonds issued, at the end of nine years at least forty per cent of the amount, and at and before the date of maturity of the bonds shall be equal to the whole amount of the principal; and the money arising from such levies shall be known as the bond fund, and shall be used for the payment of bonds and interest coupons, and for no other purpose whatever; and the treasurer shall open and keep in his books a separate and special account thereof, which at all times shall show the exact condition of said bond fund.

PORTIONS OF STATUTE RELATING TO PALO VERDE IRRIGATION DISTRICT.

CHAPTER 452.

An act to be known as "Palo Verde irrigation district act," creating a consolidated irrigation, protection and reclamation district, subject to the approval of the owners of property within the district, to be known as "Palo Verde irrigation district," for the purpose of taking over the water rights and water systems of the Palo Verde Mutual Water Company, a corporation, and of the stockholders thereof; the levees, properties and functions of the Palo Verde joint levee district of Riverside and Imperial counties, California; the properties and functions of the Palo Verde drainage district; and for the acquiring of such other properties, the construction of such other improvements and the doing of such other things as may be necessary for providing a unified and comprehensive method of supplying the irrigable low lands of Palo Verde valley comprised within the district with water for irrigation and domestic uses, reclaiming the swamp lands, destruction of mosquito pests, and protecting all the lands within the district, and the water system, from flood waters of the Colorado river, and for maintaining, improving, expanding and operating and governing the entire irrigation, protection and reclamation systems through a single district organization; providing also for the assumption, funding and payment of the bond and other obligations of said Palo Verde Mutual

Water Company and said levee and drainage districts, and for the issuance of bonds for all of the aforesaid purposes; and providing for the payment, funding and refunding of all such indebtedness; providing also for an election to determine whether this district shall be organized, and for the organization, management and control of the district through a board of trustees if the proposed district is organized; defining the powers and duties of the board, authorizing the district to sue and be sued, providing for the levy and collection of assessments to finance the acquisition of the properties, to carry on the construction work, maintenance and operation of the same, and for the payment of bonds and the expense of maintaining the district created hereby; providing also a means for dissolving said district.

[Approved June 21, 1923.]

The people of the State of California do enact as follows:

SECTION 1. The State of California and the people thereof are hereby declared to have a primary and supreme interest in securing to the inhabitants and property owners of the low irrigable lands within what is known as the "Palo Verde valley," in Riverside and Imperial counties, the greatest possible use, conservation and protection of the waters of the Colorado river to the extent that the same may be lawfully diverted to their lands, to the end that their water system, their land, structures and other properties may be protected

from overflow of the flood waters of said river, their swamp lands drained, and thereby the greatest productivity of the largest possible area may be accomplished and safely carried on within reasonable limits of economy.

Investigation having shown conditions in the Palo Verde valley to be peculiar to that valley, it is hereby declared that a general law cannot be applicable thereto, and the enactment of this special law is therefore necessary for the proper distribution and use of the waters available to the valley, the protection of the valley against inundation, the reclamation of the swamp lands, and financing the development of the valley by the means herein provided.

Sec. 2. There is hereby created, subject to the approval of the owners of property within the district as hereinafter provided, a unified irrigation, protection and reclamation district, to be known and designated as, "Palo Verde irrigation district," hereinafter in this act referred to as the "district," and which shall comprise all of the lands now included both within the boundaries of the Palo Verde joint levee district of Riverside and Imperial counties, California, and the Palo Verde drainage district, both of which are now in existence, and the boundaries of the district proposed to be created by this act are more particularly described as follows:

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Sec. 9. Powers and Duties of the District. The district shall have power:

1. To have perpetual succession and existence.

2. To sue and be sued in the name of said district in all actions and proceedings, in all courts and tribunals of competent jurisdiction.

3. To adopt a seal and alter same at its pleasure.

4. To take by grant, purchase, gift, devise or lease, to hold, use, enjoy, and to lease and dispose of, real or personal property of every kind within or without such district necessary to the full exercise of its powers.

5. To do and perform all other things necessary, incident or proper to carry into effect the purposes for which this district is created, and as provided by this act.

SEC. 10. Powers and Duties of the Board of Trustees. The board of trustees of the district, in addition to all other powers and duties prescribed by this act, shall have the following powers and duties:

1. To keep a record of all its proceedings and minutes of its meetings, which meetings shall be public, and all records of the district shall be open to the public for inspection during reasonable business hours.

2. To manage and conduct the business and affairs of the district; make and execute all necessary contracts; employ and appoint such agents, officers and employees as may be required, and prescribe their duties, and to discharge all employees. The board and its agents and employees shall have the right to enter upon any land to make surveys, and may locate the

necessary irrigation, protection, reclamation or other works or improvements, and the line of canals or conduits, and their incidental branches and laterals; also for the location of levees, dikes or other structures which may be deemed proper.

3. Said board shall also have the right to acquire, by purchase, lease or condemnation, or other lawful means, all lands and waters or water rights and other property necessary for construction, use, supply, maintenance, repair and improvements of any and all irrigation plants or systems under its control, or to be acquired or controlled by the district, or for the construction, use, supply, maintenance, repair or improvement of any and all levees, protection works, drainage or reclamation work under the control or to be acquired and controlled by the district, whether any such properties be in this or other states, and also where necessary or convenient in carrying out the purposes of this act, to acquire and hold the stock of other corporations, domestic or foreign, owning waters, canals, water works, franchises, concessions or rights, levees or drainage works. Said board may enter into and do all acts necessary or proper for the performance of any agreements with the United States or any state, county or district of any kind, public or private corporation, association, firm or individual, or any number of them, for the joint acquisition, construction, leasing, ownership, disposition, use, management, maintenance, repair or operation of any levees, works or other property of any kind which might lawfully be acquired or owned by the district, and may acquire the

right to store water in any reservoir or to carry water through any canal, ditch or conduit not owned or controlled by the district, and may grant to any owner or lessee, the right to the use of any water, the right to store such water in any reservoir of the district, or to carry such water through any canal, ditch or conduit of the district. And may likewise enter upon any acts necessary or proper for the performance of any agreements with the United States or any state, county, or district, corporation, firm or individual or any number of them, for the joint acquisition, construction, maintenance or repair of any levees or other protection works or drainage or other reclamation works.

4. To construct dams, reservoirs and works for the collection of water for the district, and to do any and every lawful act necessary to be done that sufficient water may be furnished to each land owner or inhabitant in the district for irrigation and domestic purposes, and may contract to supply water to any mutual water company within the district which is or may be organized to furnish water to certain specified lands within the district, provided the lands so supplied by any such mutual water company are within this district, and may contract for supplying such lands with water through such mutual water companies.

The board is authorized and empowered to take conveyances, leases, contracts or other asurances for all property acquired by it under the provisions of this act, in the name of this district, to and for the uses and purposes herein expressed, and to institute and

maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this act, and to enforce, maintain, protect or preserve any and all rights, privileges and immunities created by this act or acquired in pursuance thereof, and may appear and defend in person or by attorneys in the name of such irrigation district.

5. The legal title to all property acquired under the provisions of this act shall immediately, by operation of law, vest in the district, and shall be held by the district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this act. And said board is hereby authorized and directed to hold, use, manage, keep and possess, said property as herein provided. The board may determine by resolution duly entered upon its minutes, that any property, real or personal, held by such irrigation district, is no longer necessary to be held for the uses and purposes thereof, and may thereafter sell such property, and a conveyance of any property held by this district, executed by the president and secretary thereof, in accordance with the resolution of the board of trustees of such district, when sold for a valuable consideration, shall convey a good title to the property so conveyed.

6. It shall be the duty of the board of trustees to establish suitable by-laws, rules and regulations for the distribution and use of water among the owners of lands, which must be printed in convenient form for the use of the district.

7. When the board of trustees deems it advisable for the best interest of the district and the convenience of the electors thereof, it may at any time, but not less than sixty days before an election to be held in the district, divide the district into divisions or precincts for election purposes, but such divisions shall be made as nearly equal in area or population as may be practicable. The boundaries of the divisions and precincts or any subsequent changes therein must be shown on the minutes of the board. Should the district be divided into divisions or precincts by the board of trustees for the purpose of holding elections thereafter, any property owner owning property in one or more precincts or divisions, must cast the ballots represented by his respective parcels in each precinct where such parcels are situate respectively, and if any such parcel lies partly in one precinct and partly in another, he may cast the ballots represented thereby in either, but before doing so he must notify the election board in the other precinct of his intention to do so, in order that the election board may note the ballots represented by said land as having been voted.

8. After the first election of trustees held in pursuance of the provisions of this act, all subsequent regular elections shall be called annually at the times fixed for the holding of the annual election, and the trustees shall cause notice of such elections to be given for the period and in the manner hereinbefore prescribed in reference to the first election, and the trustees shall perform all the duties in respect to giving notice of the election, establishing election boards, pro-

viding the ballots and assessment roll records necessary for conducting the election, designating voting places, causing the returns to be canvassed, and the results declared, which have been imposed upon the supervisors in respect of the first election.

Likewise, the board of trustees shall perform all the acts necessary for calling and conducting special elections provided for in this act.

In all elections for trustees the persons receiving the highest number of votes shall be deemed elected for the office to be filled. If an election is not held as herein provided, then upon the filing of a petition with the secretary of the board of trustees, signed by property owners owning real property assessed upon the last preceding equalized assessment roll at not less than the aggregate of five thousand dollars, requesting that a special election be called for the election of officers, the trustees of such district shall thereupon call a special election for the election of such officers, such election to be held within not less than forty days after the filing of such petition.

Each member of the board of trustees shall qualify on or before noon of the tenth day following his election, by executing an official bond in the sum of five thousand dollars, which bond shall be approved by a judge of the superior court of Riverside county, and shall be recorded in the office of the county recorder thereof, and filed with the secretary of the board. All official bonds herein provided for shall be in the form prescribed by law for the official bonds of the county

officers, and premiums thereof may be paid by the district.

9. The board of trustees shall also have power generally to perform all other such acts as shall be necessary to fully carry out the purpose of this act.

SEC. 11. Acquiring or Controlling the Water System of the Palo Verde Mutual Water Company. As soon as may be practicable after the organization of the district, the board of trustees is empowered and it shall be its duty to take steps for the acquisition of the water rights and water system of the Palo Verde Mutual Water Company and its stockholders, in the manner authorized and provided by this section, as follows:

Subdivision 1. If after investigation and negotiations with the representatives of the Palo Verde Mutual Water Company, it is found practicable to contract for the purchase of the water rights and system of the Palo Verde Mutual Water Company, either by payment therefor in money or in bonds to be issued by this district as hereinafter provided, then a complete inventory and appraisal of all water rights and properties or property rights owned by said mutual water company shall be made up and appraised by competent engineers and appraisers selected by the parties for that purpose. But such inventory and appraisement shall comprise only the water rights and operating properties forming a part of the system or pertaining thereto. If, as a result of such negotiations, investigation and appraisement the board of trustees is able to agree with said water company upon what

they deem to be a fair valuation of said properties to be fixed as the purchase price thereof, then the proposed plan of purchase and the price agreed to be paid therefor, with the terms and manner of payment, shall be reduced to writing, duly executed by both parties, and shall constitute the basis of acquisition, and shall be carried out as agreed upon.

If, however, the trustees and said water company are unable to agree upon the price, terms or manner of purchase, the proposal to purchase may, at the option of the board of trustees, be submitted to the water commission of the State of California, for determination of the value of the property and property rights to be acquired, and the terms and manner of carrying the purchase into effect, provided the water company shall agree to such submission and to be bound thereby. If the submission is agreed upon, it shall be the duty of the water commission to cause an investigation to be made in such manner and to such extent as it may deem necessary or proper (but at the expense of the district) and may, if it deems proper to do so, have a public hearing thereon conducted at such time and place and in such manner and after such notice as may be prescribed by the commission. But the commission shall, within ninety days after notice of the agreement of submission, make findings of the reasonable and fair valuation of the properties and property rights involved, and the reasonable and proper terms upon which the purchase price shall be made, and such findings shall be binding upon the parties, and the trustees are authorized and empowered to proceed with the

necessary steps to carry into effect the purchase on those terms. But if the board of trustees and the representatives of the water company can not agree upon a submission of the same to the water commission, then the board of trustees is hereby authorized and empowered and the district is hereby granted the power to institute and maintain condemnation proceedings for the acquisition of said water rights and water system, and the acquisition of the same is hereby declared to be a beneficial public use and said district is empowered to acquire the same by proceedings in eminent domain conducted substantially in the manner provided by the general laws for the acquisition of private property for a public use by such procedure.

In the acquisition of the water rights and water system of said Palo Verde Mutual Water Company by the district, the board of trustees, in its discretion, may acquire the water rights and system, subject to whatever existing rights the stockholders or users of said water may have to have water supplied to their lands to the extent that the same is appurtenant thereto, in which event the title conveyed to the district shall be subject to such rights and the district shall assume the obligation of supplying water to such land owners to the extent of their rights and in the manner and upon the terms which such users are entitled to receive the same; but in the acquisition of the water rights and system of the Palo Verde Mutual Water Company and its stockholders, the board of trustees is, in its discretion, authorized and empowered to take over and acquire the water rights of the stockholders

as well as the property rights of the corporation, either by purchase or condemnation to the end that ultimately all waters available for supply or which may be made available for supply to the lands and inhabitants of the district may be distributed in accordance with uniform rules and regulations throughout the entire district, and all priorities or discrimination eliminated.

Subdivision 2. If after investigation and negotiation it is found feasible and practicable to acquire the ultimate ownership and control of the water rights and system of the Palo Verde Mutual Water Company and its stockholders, by taking over by purchase or otherwise, all of the outstanding stock of said corporation and through that means ultimately cause all of the water rights and system of said mutual water company to be conveyed to the district, and thereby eliminate vested rights or priorities so that the entire body of water available may be distributed under uniform regulations throughout the district, the board of trustees is hereby authorized and empowered to do and perform all things necessary for the purpose of acquiring all the stock of the stockholders of said water company, either through purchase, exchange of bonds therefor, or condemnation proceedings, and it may, with that ultimate object in view or by way of expediting or assisting in bringing about the acquisition of the water rights and plant from the corporation itself, or from the corporation and the stockholders as provided in the previous subdivision, purchase or contract to purchase, or procure options, for the whole

or any part of the stock of said mutual water company from time to time, or may institute and prosecute condemnation proceedings for that purpose until all of the stock is acquired or all of the properties of said mutual water company are acquired as hereinbefore provided; but before any stock of said company is purchased or contracted to be purchased, the question of the value thereof must be carefully investigated by the board of trustees, with the assistance of competent appraisers, and no stock shall be purchased at a price in excess of the maximum amount found by the trustees to be the reasonable and fair value thereof. But, within the price so fixed, the district through its board of trustees, may purchase or contract to purchase any part of the stock, but nothing herein contained shall in any manner impair the right of the district to maintain condemnation proceedings for the acquisition of the stock or water rights of the stockholders of said water company, at any time, and such acquisition is likewise hereby declared to be a beneficial public use.

Subdivision 3. If after negotiation and investigation or at any time it is found impracticable or inadvisable to acquire the whole or any part of the water rights and water system of the Palo Verde Mutual Water Company and its stockholders by purchase, exchange or condemnation, or pending the ultimate acquisition of the whole of the system and the water rights mentioned, then the district, through its board of trustees, is hereby authorized and empowered to take over the management, control and operation of such system and water rights by lease or contract,

upon such terms and conditions and for such period as may be agreed upon by the trustees, and said water company.

If the control and management of the system and water rights is thus taken over by the district, the same shall be operated in such manner as to conform to and respect vested rights and priorities of the stockholders or users of said water to the extent that they may be entitled to have any lands to which said waters are appurtenant, supplied with water from said system; but in so far as may be lawfully possible, all water shall be made available for distribution and shall be distributed to all lands within the district, under uniform rules and regulations and without discrimination, and the district shall be authorized and empowered to carry on all work necessary to safeguard and expand the distribution of water supply, and to protect the system against floods from the Colorado river, and to conserve and extend the beneficial use of the water to the utmost throughout the district, by reclamation, protection, or otherwise.

Subdivision 4. The use of all water required for the irrigation of lands within this district, and for domestic and other incidental and beneficial uses within the district, together with the rights of way for canals and ditches, the headworks, conduits, reservoirs and sites for reservoirs, and all other property required in full carrying out the provisions of this act, is hereby declared to be a public use, subject to the regulations and control of the state in the manner prescribed by law.

SEC. 12. Taking Over the Properties and Functions of the Palo Verde Joint Levee District. The district is authorized and empowered, through its board of trustees, to take over the properties, property rights and functions of the Palo Verde joint levee district of Riverside and Imperial counties, California, and it shall be the duty of the board of trustees to take the necessary steps for acquiring the same in the following manner:

Upon approval of the property owners, of the creation and organization of this district by a majority vote, at an election to be held for that purpose as hereinbefore provided, and as soon as the organization of the district is complete by the election and qualification of its officers, all of the levees, properties, property rights and functions of the Palo Verde joint levee district above mentioned, shall revert to and become vested in this district, but subject, however, to the rights of the holders of any and all of the bonds or other outstanding claims or evidence of indebtedness of said Palo Verde joint levee district, and the lien of all such bonds and all rights of the bondholders and creditors of said levee district shall be unimpaired and enforcible against the lands and property owners within the boundaries of said joint levee district to the same extent and in like manner as if this act had not been passed, and said district continued to exist; *but provided, however,* that all of such outstanding bonded or other indebtedness shall be assumed by this district, and the collection of principal and interest may be enforced through this district in like manner as it might

have been enforced through the joint levee district, and the board of trustees of this district is hereby authorized and empowered, and it shall be its duty to carry into effect and perform, all of the obligations undertaken by said levee district through this district, and the trustees thereof, for the assessment and collection of taxes for the payment of the principal and interest of said bonds and other indebtedness, and all other obligations and duties in every other respect provided for the protection, payment and liquidation of the principal and interest of the bonded and other indebtedness of said joint levee district.

All bondholders and creditors or other persons having rights or relations with said joint levee district or the trustees or officers thereof are hereby authorized and empowered to deal with the trustees of this district, and to enforce their rights as against this district in like manner as might be done against the joint levee district above mentioned and the trustees and officers thereof, and all notices, demands, tenders or other dealings that might have been had with said joint levee district or the trustees or officers thereof may be made to or had with the trustees of this district with the same force and effect. Likewise, all obligations or duties or indebtedness undertaken or contracted to be paid or performed by any persons, firms or corporations, to or with said joint levee district, may be enforced for or paid to this district with the same force and effect, and in like manner as undertaken to be performed for or paid to said joint levee district. And this district shall have the right to en-

force all rights or obligations which have accrued or may accrue to said joint levee district.

The trustees of this district, as soon as they qualify and are organized as hereinbefore provided, shall take over and become vested with the management of all levees, properties, records, moneys on hand or other assets of said joint levee district, and the trustees of said joint levee district shall deliver all of such property, records or other assets to the trustees of this district, and thereupon said district shall be deemed to be merged in and superseded by this district, and cease to exist except in so far as may be necessary to preserve the rights of bondholders and other creditors; *provided, however,* that all funds or properties which come into the possession or under the control of this district from said levee district shall be expended and used only in connection with the joint levee district work, and for the purposes authorized by the act under which it was created.

The title to all properties of the joint levee district and all property and other rights belonging to or existing in favor of said district are hereby vested in this district, and this district shall have the right to maintain suits or other proceedings necessary for the protection and enforcement of any of the rights of said levee district, and may be sued and shall have the right to defend in like manner as suits might have been maintained or defended if said levee district had continued to exist.

Upon the taking over of the property and affairs of said levee district, the board of trustees of this district

is authorized and empowered, and it shall be its duty, to proceed as rapidly as may be practicable with the necessary construction work for the improvement, extension and better protection and preservation of the water system, the lands and inhabitants within the district, against overflow of flood waters from the Colorado river, and to maintain and operate the same to the end of preventing if possible a repetition of the devastating floods of previous years. In that behalf and for that purpose the board is authorized to cooperate with the United States government, the government of the state of Arizona or of the State of California, or any other public agencies, departments, districts or private concerns, or individuals, in any joint project that may be undertaken for straightening or changing the course of the channel of the Colorado river or keeping the same within its levees and banks, provided the board of trustees deem it advisable to do so.

Sec. 13. Taking Over the Properties and Functions of the Palo Verde Drainage District. The district is authorized and empowered, through its board of trustees, to take over the properties, property rights and functions of the Palo Verde drainage district, and it shall be the duty of the board of trustees to take the necessary steps for acquiring the same in the following manner:

Upon approval of the property owners of the creation and organization of this district by a majority vote, at an election to be held for that purpose as herein provided, as soon as the organization of the

district is complete by the election and qualification of its officers, all of the canals, properties, property rights and functions of the Palo Verde drainage district above mentioned, shall revert to and become vested in this district, but subject, however, to the rights of the holders of any and all of the bonds or other outstanding claims or evidence of indebtedness of said Palo Verde drainage district, and the lien of all such bonds and all rights of the bondholders and creditors of said drainage district shall be unimpaired and enforcible against the lands and property owners within the boundaries of said drainage district to the same extent and in like manner as if this act had not been passed, and said district continued to exist; *but provided, however,* that all of such outstanding bonded or other indebtedness shall be assumed by this district, and the collection of principal and interest may be enforced through this district in like manner as it might have been enforced through the drainage district, and the board of trustees of this district is hereby authorized and empowered, and it shall be its duty to carry into effect and perform all of the obligations undertaken by said drainage district, and the trustees thereof for the assessment and collection of taxes for the payment of the principal and interest of said bonds and other indebtedness, and all other obligations and duties in every other respect provided for the protection, payment and liquidation of the principal and interest of the bonded and other indebtedness of said drainage district.

All bondholders and creditors or other persons having rights or relations with said drainage district or

the trustees or officers thereof are hereby authorized and empowered to deal with the trustees of this district, and to enforce their rights as against this district, in like manner as might be done against the drainage district above mentioned, and the trustees and officers thereof, and all notices, demands, tenders or other dealings that might have been made to, or had with the said drainage district or the trustees or officers thereof may be made or had with the trustees of this district with the same force and effect. Likewise, all obligations or duties or indebtedness undertaken or contracted to be paid or performed by any persons, firms or corporations, to or with said drainage district, may be performed for or paid to this district with the same force and effect, and in like manner as undertaken to be performed for or paid to said drainage district. And this district shall have the right to enforce all rights or obligations which have accrued or may accrue to said drainage district.

The trustees of this district, as soon as they qualify and are organized as hereinbefore provided, shall take over and become vested with the management of all canals, reclamation work, properties, records, moneys on hand or other assets of said drainage district, and the trustees of said drainage district shall deliver all of such property, records or other assets to the trustees of this district, and thereupon said district shall be deemed to be merged in and superseded by this district, and cease to exist except in so far as may be necessary to preserve the rights of bondholders and other creditors; *provided, however,* that all funds or

properties which come into the possession or under the control of this district from said drainage district shall be expended and used only in connection with the drainage district work, and for the purposes authorized by the law in pursuance of which it was organized.

Upon the taking over of the property and affairs of said drainage district, the board of trustees of this district is authorized and empowered, and it shall be its duty to proceed as rapidly as may be practicable, with the necessary construction work for the improvement and better drainage and reclamation of the lands and improvements within the district, and to maintain and operate the same to the end that the greatest area within this district may be rendered cultivable. In that behalf and for that purpose the board is authorized to cooperate with the United States government, the government of the state of Arizona or of the State of California or any other public agencies, departments, districts or private concerns, or individuals, in any joint project that may be undertaken for the drainage or other reclamation work for the protection or improvement of the district in so far as the board of trustees deem it advisable to do so.

SEC. 14. Extension and Improvement of Existing Levees, Drainage Canals and Water Systems. The district, through its board of trustees, is further authorized and empowered, and it shall be the duty of the trustees, as soon as may be practicable and as rapidly as funds may be available for that purpose, to proceed with the strengthening and extension of

existing levees or other works for the protection of the valley against overflow and inundation from the Colorado river; and likewise, the further extension and development of the water system to be taken over by the district, and the strengthening and improvement of its canals, laterals, head-works and distribution system generally; and also for the further construction of drainage canals and ditches and other works necessary for the drainage of the swamp and overflowed lands; also for the further protection of the inhabitants of the district and the improvement of health or other conditions in the valley to take such steps as may be necessary or proper for the elimination of mosquitos or other insect pests; *provided, however,* that no new construction work shall be contracted, nor shall any replacement or repair work be contracted, where the cost thereof will exceed three thousand dollars without first causing a description of the work to be performed, with specifications and plans to be prepared and at least ten days' notice given of an intention to contract for the work, and inviting sealed bids. Such notice must be given by publishing notice at least once during the week preceding the time for submitting bids, in a newspaper published within the district, or if none is published therein, then within the county of Riverside, State of California, as the board of trustees may direct. The work must be let to the lowest and best responsible bidder, but the trustees shall have the right to reject any and all bids; *provided, however,* that in the event the properties or inhabitants within the district, or the levees, water

system or reclamation works, or any part thereof, shall be threatened with destruction or serious damage by reason of rapid or unusual rise of water in the Colorado river, or from any other cause, and in the judgment of the board of trustees, necessity exists for immediate and prompt action, all materials may be purchased, all labor contracted or otherwise procured, and all other indebtedness may be incurred which, in the judgment of the board of trustees, may be necessary to meet the emergency, without the necessity of competitive bidding or notice, and all indebtedness thus contracted shall be a legal obligation against the district; *but provided, however,* that the determination of the board of trustees that an emergency does exist must be entered in the minutes of the board; *provided, further,* that nothing herein contained shall be construed as requiring the board of trustees to carry on any of its construction, maintenance, repair or other work through contracting or letting the same, but it shall be optional with the district, through its board of trustees, to contract all or any part of such work through competitive bidding as above provided, or the district may, through its board of trustees, employ the necessary labor and furnish the necessary materials to carry on any and all work authorized by this act, under the supervision of the board of trustees, and full power is vested in the board of trustees for that purpose; *but provided, however,* that if the trustees undertake to carry on such construction, replacement, repair or other work through its own supervision, and it becomes necessary to purchase materials or supplies

in lots of greater value than two thousand dollars, competitive bidding must be invited by like notice as hereinbefore provided with respect to the letting of contracts, and the property must be purchased from the lowest responsible bidder, but the board, however, shall have the right to reject any and all bids.

SEC. 15. Issuance of Bonds. For the purpose of acquiring the water rights and irrigation system of the Palo Verde Mutual Water Company or any other water rights or system which it may, by the trustees, be deemed advisable to acquire; for the purpose also, of strengthening, and extending the present levees, adding to and providing other levees, and for other protection work; for the purpose of maintaining, repairing and improving and extending the water system and the acquisition of further water rights, and the further development of water and improving and maintaining the system; for the purposes of maintaining, repairing, extending the drainage canals and of carrying on other reclamation work, including the destruction of pests or other nuisances incident to swamp conditions, and for the purpose of maintaining and operating the whole system of protection, irrigation and reclamation works, and for the purpose of making the necessary surveys, examinations, drawings and plans for all such work; also for the purpose of payment of principal and interest upon outstanding bonds or other obligations of the Palo Verde joint levee district of Riverside and Imperial counties, California, the Palo Verde drainage district, and the Palo Verde Mutual Water Company (if the system of said com-

pany is taken over by this district as hereinbefore authorized), or for the purpose of redeeming any or all of such bonds, or for the purpose of providing for the refunding of the same, or any part thereof; and generally, for defraying the expense of carrying all the purposes of this act into effect, the district is authorized to issue and dispose of its bonds as herein provided.

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SEC. 17. Provisions for making bonds legal investments for trust funds, etc. Whenever the board of trustees shall by resolution declare that it deems it desirable that any contemplated or outstanding bonds of said district, including any bonds authorized but not sold, shall be made available for the purposes provided for in section seven of an act of the legislature of the State of California entitled, "An act relating to bonds of irrigation districts, providing under what circumstances such bonds shall be legal investments for funds of banks, insurance companies, and trust companies, trust funds, state school funds and any money or funds which may now or hereafter be invested in bonds of cities, cities and counties, counties, school districts or municipalities, and providing under what circumstances the use of bonds of irrigation districts as security for the performance of any act may be authorized," approved June 13, 1913, as amended, the said board of trustees shall thereupon file a certified copy of such resolution with the commission created by, and provided for in, said act, which commission, and the state controller in connection there-

with, are hereby given the same power and authority in respect of the investigation and certification of bonds issued under this act as is given to them in respect of the investigation and certification of irrigation district bonds by said act, as amended, except as the same may be limited by, or inconsistent with, any provision of this act, and bonds of said district which have been so investigated and certified and declared to be legal investments for the purposes stated in said act approved June 13, 1913, as amended, may be lawfully purchased or received in pledge for loans by savings banks, trust companies, insurance companies, guardians, executors, administrators, and special administrators, or by any public officer or officers of this state or of any county, city, or city and county, or other municipal or corporate body within this state having or holding funds which they are allowed by law to invest or loan; *provided, however,* that where said commission has passed upon one issue of bonds of said district, all subsequent issues of said district shall be submitted to said commission as in the said act provided.

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SEC. 24. Paid by Annual Assessment. All bonds issued and the interest thereon shall be paid from revenue derived from an annual assessment upon the land within the district and the improvements thereon, and all said properties within the district shall be and remain liable to be assessed for such payment, as hereinafter provided, in so far as any bonds created or authorized under the provisions of this act are concerned; but with respect to all bonds that have been

issued and sold, or which may hereafter be sold, of the said Palo Verde joint levee district and the Palo Verde drainage district, the interest and principal thereof shall be paid from revenue derived from the annual assessment upon the properties within the boundaries of said respective districts, which are taxable therefor under the provisions of said bonds and the acts in pursuance of which they were created.

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Sec. 26. Estimate of Annual Money Requirements of the District. The board of trustees of the district shall each year before the first day of September, and at such other times as the boards of supervisors of the counties of Riverside and Imperial may deem advisable, cause to be prepared and submitted to said boards of supervisors of the counties of Riverside and Imperial, a detailed statement showing the estimated amount of money that will be required for the purpose of payment of the interest payments or installments of principal to become due, upon any of the outstanding bonds of the Palo Verde joint levee district of Riverside and Imperial counties, California, or the Palo Verde Mutual Water Company (should the system of that company be taken over and any of its bonds assumed by this district), or the Palo Verde drainage district, or the bonds of this district, and also a detailed statement of the amount necessary to maintain, repair and operate the levees, water works, or reclamation works, or the maintenance, upkeep or operation of any other works under the control of the district, and likewise to defray the expenses of ad-

ministering or conducting the affairs of the district, and of carrying into effect the purposes of this act during the forthcoming fiscal year. The statements of the interest payments to become due upon the bonds of this district, the levee district, and the drainage district, or other bonds assumed by this district, as well as the expenditures necessary for the levee protection work, drainage or reclamation work constructed by said respective districts shall all be separately stated. Should the board of trustees of the district fail to furnish such statement, it shall nevertheless be the duty of the boards of supervisors of said counties to ascertain the amount required to meet interest and installments of principal which will accrue during the forthcoming year, as well as such payments as may have accrued and remain unpaid, and assess and collect said amount as herein provided.

Sec. 27. Assessed Property. It shall be the duty of the county official of Riverside county having custody of the assessment roll of said county, and likewise the duty of the county official having custody of the assessment roll of Imperial county at the times herein mentioned, to furnish to the board of supervisors of their respective counties, on or before the first day of September of each year after the formation of this district, and at such other times as the board of trustees of this district shall require, a detailed statement showing the total assessed value of all real property, with the improvements thereon, within the boundaries of this district, to be taken from the last preceding equalized assessment roll for

their respective counties, and said statement shall indicate what part of said total assessed valuation applies to lands with the improvements thereon within the boundaries of the Palo Verde joint levee district of Riverside and Imperial counties, but not within the boundaries of the Palo Verde drainage district; and likewise what part of said total valuation applies to lands within the Palo Verde drainage district, but not included within the boundaries of the Palo Verde levee district. Said statement shall also indicate the value of all personal property assessable within said joint levee district, and any and all other data necessary to enable the board of supervisors of their respective counties, or the board of trustees of this district, to fix the tax rate or to levy such assessments upon the taxable property within all said districts which may be taxable therefor under the provisions of this act, or the acts under which said joint levee district and drainage district were organized.

Sec. 28. Annual Tax Levy. At the time when by law it is the duty of the board of supervisors of each of said counties to fix the annual tax rate for said respective counties of Riverside and Imperial, the said boards of supervisors taking as a basis the last previous report of the board of trustees of the estimated amount to be required to be raised for the forthcoming fiscal year and valuation of the lands and improvements thereon within the district, as provided them by said county official having custody of said assessment rolls, must levy a tax upon all of the lands, with the improvements thereon, in the district suffi-

cient to raise the amount set forth in the report as made by said board of trustees as aforesaid, but in levying said tax, a rate shall be fixed for raising the amount to meet the principal and the accrued interest on the outstanding bonds of the said Palo Verde joint levee district, and the amount necessary for the maintenance, repair and operation of the levees constructed by said levee district, based upon the assessed value of the lands within the boundaries of said district, and a separate rate for the raising of money necessary to meet accrued installments of principal and interest on the bonds of the said drainage district, estimated amount for maintenance, repair and operating the drainage or reclamation systems installed or constructed by that district, and a separate rate also for raising the amount necessary to meet installments of principal and interest accruing on the bonds of this district, and all other expenses incident to the purpose of this district, and the taxes shall be spread over the land of this district in such manner as that all lands comprised within the boundaries of all three districts, shall be assessed at the total of the three rates added together, and the lands within the drainage district, but not within the levee district, shall be assessed at the rate applicable to this district plus the rate applicable to the drainage district, and all lands within the levee district but not within the drainage district shall be assessed at the sum of the rate applicable to the levee district and to this district, but all properties acquired by this district after its organization, and all construction work or im-

provements in the way of providing, maintaining and operating water works, protection work or reclamation work in the entire district shall be deemed to be, and is hereby declared to be for the benefit of all lands within the district, and the cost thereof shall be apportioned and raised by taxation uniformly over the entire district in accordance with the assessed valuation of the real estate and improvements thereon within the district.

In ascertaining the rate of taxation fifteen per cent shall be deducted from the aggregate value of the lands and improvements within the district, as shown by the statement prepared and furnished to said boards of supervisors by the assessors, or other county official, as hereinbefore provided, for anticipated delinquencies, and then the sums necessary to be raised shall be divided by the remainder of such aggregate assessed value as shown in said statements furnished by said officers. The taxes so levied shall be copied and entered on the assessment role by the proper county officers and collected at the time and in the same manner as county taxes; and when collected shall be paid into the county treasury for the use of the district. All taxes so levied as herein provided shall be a lien upon the lands and properties in said district in the manner and with the same effect and collected in the same way as are county taxes.

Sec. 29. Disbursement of District Funds. All moneys collected from the district, either from taxes or from any other source, shall be deposited with the county treasurer of the county of Riverside and placed

in a fund to be called "The Palo Verde irrigation district fund." It shall be the duty of the county treasurer of Imperial county, as funds derived from the collection of taxes levied by virtue of this act upon the property within this district located in Imperial county, are paid over to him by the tax collector of said county, to transmit the same to the county treasurer of Riverside county to be deposited by said last named treasurer in the fund above mentioned, but the county treasurer of Imperial county shall not be required to transmit said funds as they accumulate oftener than every thirty days. All payments required to be made by the district in pursuance of this act shall be made upon warrants drawn by the county auditor upon said fund and based upon itemized requisitions signed by the president and secretary and one member of the board of trustees other than the president and secretary, and paid by the treasurer, but accurate account shall be kept by the board of trustees of the amount of funds on hand applicable to the particular purpose for which taxes have been levied, or bonds sold, and no disbursement from the fund shall be made for any purpose in excess of the amounts authorized for such purpose, and each requisition shall show on its face the account to which the same is chargeable. Upon the requisition of the board of trustees the auditor is authorized to draw a warrant from time to time in favor of the district for the purpose of providing an emergency fund for the payment of emergency expenses, and the treasurer is authorized to pay such warrant, but the trustees shall cause the same to be deposited in a reputable

bank to the credit of the district, and such fund may be disbursed on checks in the name of the district signed by the president and secretary and countersigned by one member of the board of trustees in addition to the president and secretary for emergency purposes; *but provided, however,* that the amount on deposit in that fund shall never exceed five thousand dollars, and an itemized statement of the disposition of the same shall be made at least every thirty days, verified by the oath of the president and secretary and filed with the county auditor of Riverside county; *and provided, further,* that the board of trustees shall at all times keep in force a good and sufficient indemnity bond executed by a reputable corporation authorized to engage in the business of executing fidelity bonds in the State of California in an amount to be fixed by the board of trustees.

* * * * * * *

SEC. 39. Bonds Exempt from Taxation. Any and all bonds issued under the provisions of this act are hereby given the same force, value and use as bonds issued by any municipality, and shall be exempt from any taxation within the State of California.

* * * * * * *

SEC. 53. Provision for Funding Outstanding Bonds. At the time fixed for the levying of assessments for other purposes authorized by this act, there shall be levied an assessment sufficient in amount to pay the principal and interest then due and unpaid on any bonds issued for funding purposes as herein provided, and also the amount to become due on any

such bonds during the year following such levy. The assessment so levied shall be computed and entered in the assessment roll in the same manner, and shall be collected at the same time and in the same manner as other assessments authorized by this act, and when collected shall be paid to the county treasurer of the county of Riverside for the purposes herein authorized. All provisions of this act relating to the collection of assessments shall be applicable to the assessments levied under this provision.

* * * * * * *

SEC. 56. Bonds Are a Lien on Property. Any bonds issued under the provisions of this act shall for funding or refunding purposes, be a lien upon the real property of the district, and said bonds and the interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district and improvements, and all such property in said district shall be and remain liable to be assessed for such payments as hereinbefore provided.

* * * * * * *

SEC. 59. Tax Levy to Pay Interest and Principal. The board of trustees shall cause to be assessed and levied each year upon the real property and the improvements thereon in the district, in addition to the levy authorized for other purposes, a sufficient sum to pay the interest on or principal of such refunding bonds in the same manner as provided in this act relating to the levy and collection of assessments for other purposes.

* * * * * * *

CHAPTER 51.

An act to amend the act entitled "An act to be known as 'Palo Verde irrigation district act,' creating a consolidated irrigation, protection and reclamation district, subject to the approval of the owners of property within the district, to be known as 'Palo Verde irrigation district,' for the purpose of taking over the water rights and water system of the Palo Verde Mutual Water Company, a corporation, and of the stockholders thereof; the levees, properties and functions of the Palo Verde joint levee district of Riverside and Imperial counties, California; the properties and functions of the Palo Verde drainage district; and for the acquiring of such other properties, the construction of such other improvements and the doing of such other things as may be necessary for providing a unified and comprehensive method of supplying the irrigable low lands of Palo Verde valley comprised within the district with water for irrigation and domestic uses, reclaiming the swamp lands, destruction of mosquito pests, and protecting all the lands within the district, and the water system, from flood waters of the Colorado river, and for maintaining, improving, expanding and operating and governing the entire irrigation, protection and reclamation systems through a single district organization; providing also for the assumption, funding and payment of the bond and other obligations of said Palo Verde Mutual Water Com-

pany and said levee and drainage districts, and for the issuance of bonds for all of the aforesaid purposes; and providing for the payment, funding and refunding of all such indebtedness; providing also for an election to determine whether this district shall be organized, and for the organization, management and control of the district through a board of trustees if the proposed district is organized; defining the powers and duties of the board, authorizing the district to sue and be sued, providing for the levy and collection of assessments to finance the acquisition of the properties, to carry on the construction work, maintenance and operation of the same, and for the payment of bonds and the expense of maintaining the district created hereby; providing also a means for dissolving said district," approved June 21, 1923, as amended, by amending sections numbered 8a, 10, 26, 28, 28h, 28j, 28k, 28l, 28m, 28n, 28o, 29, 56, 59, and 64 thereof and by repealing section 28e thereof and by adding thereto new sections, to be numbered and providing as follows, to wit: section 10a, relating to rates of tolls and charges and section 28½o, relating to partial redemption from delinquent assessments, and declaring same an urgency measure.

Sec. 10*a*. The board of trustees shall have the right to establish penalties and restrictions upon the excessive and wasteful use of water, for the purpose of conserving the water of said district and for the

purpose of preventing injury to the lands of said district. For said purposes and/or likewise for the purpose of defraying any or all of the expenses or obligations of said district or for which said district may be liable, the board of trustees may in lieu (either in part or in whole) of levying the taxes as in this act provided for, fix rates of toll and charges for irrigation and other public uses declared by this act, and collect the same from all persons using water for irrigation and domestic use and/or from all persons owning or possessing land within said district which may be entitled to water for irrigation or entitled to such other public uses, and, upon order of said board, may be made payable only in case of delivery of water in excess of a specified quantity of water per unit of land. Such tolls or charges may be levied and fixed (either in part or in whole)on the basis of the assessed value of land within the district (exclusive of improvements) as shown on the last preceding equalized assessment roll of the district, or otherwise as the board shall provide. If such tolls and charges are fixed and levied upon any other basis than in accordance with the use of water, the board of trustees shall provide for a hearing upon the manner, rate and amount of such tolls and charges and shall give notice thereof and of the time and place of said hearing by publication once a week for two weeks in a newspaper published in said district, or if there be none, in the county of Riverside. The said hearing may be held on or after ten days from the first publication. Such tolls or charges shall be payable in cash and may by the board of trustees be made payable either at one time or in installments

to the district tax collector separately from taxes and in such manner as the board of trustees may provide, or said board of trustees may make the same payable with either or both of the installments of annual taxes levied by the district. Whenever any tolls or charges have been established by the board of trustees, said board may make the same payable in advance, either at one time or in installments, and may refuse to furnish water unless such tolls or charges are paid in advance. Any such tolls or charges not by order or resolution of said board made payable with district taxes, remaining unpaid at the time specified for the delivery of the next ensuing assessment roll to the collector of the district may, by order of said board, be added to and become a part of the annual assessment upon the land upon which such tolls or charges are unpaid. Such unpaid tolls and charges shall be payable with and as a part of the first installment of said assessment, or equally with both installments as the board may order, but no allowance or deduction shall be made on account of such unpaid tolls or charges in levying the tax provided for in section 28 hereof.

All amounts added to the assessment roll under the provisions hereof shall be collected at the same time, with like effect and in like manner, with the said installment or installments of district taxes.

Sec. 28. On or before the first Monday after the eighteenth day of August of each year the board of trustees, taking as a basis the detailed statement required in section 26 of this act and the valuation of the lands and improvements thereon within the dis-

trict and the personal property within said levee district in accordance with the district assessment roll, must levy a tax sufficient to raise the amount set forth in said detailed statement, which tax shall be levied as follows:

1. A rate shall be fixed for raising the amount necessary to meet the principal and the accruing interest on the outstanding bonds of said levee district, which said rate shall be levied upon and in accordance with the assessed value of the lands, improvements and personal property within the boundaries of said levee district.

2. A separate rate shall be fixed for raising the amount necessary for the maintenance, repair and operation of the levees constructed by said levee district, which said rate shall be levied upon and in accordance with the assessed value of the lands, improvements and personal property within the boundaries of said levee district.

3. A separate rate shall be fixed for raising the money necessary to meet the principal and accruing interest on the bonds of said drainage district, which said rate shall be levied upon and in accordance with the assessed value of all lands within said drainage district.

4. A separate rate shall be fixed for raising the amount necessary for maintenance, repair and operation of the drainage and reclamation system installed or constructed by said drainage district, which said rate shall be levied upon and in accordance with the assessed value of all lands within said drainage district.

5. A separate rate shall be fixed for raising the amount necessary to maintain, repair and operate the irrigation system of the district, which said rate shall be levied upon and in accordance with the assessed value of all lands within the boundaries of this district.

6. A separate rate shall be fixed for raising the amount necessary to meet the principal and accruing interest on the bonds of this district, which said rate shall be levied upon and in accordance with the assessed value of all lands and improvements thereon within this district.

7. A separate rate shall be fixed for raising all other amounts set forth in said detailed statement required in section 26 of this act, which said rate shall be levied upon and in accordance with the assessed value of all lands and improvements thereon within this district.

There shall be four funds of said district kept by the county treasurer: the levee district bond and interest fund; the drainage district bond and interest fund; the irrigation district bond and interest fund; and the general fund. Moneys collected from the levies for principal and accruing interest on the bonds of the levee district, drainage district and irrigation district shall be placed in the appropriate funds and used only for said respective purposes. All other moneys collected from the other levies shall be placed in the general fund.

All properties acquired by this district after its organization and all construction work and improvements in the way of providing, maintaining and oper-

ating protection work or reclamation work in the entire district shall be deemed to be and are hereby declared to be for the benefit of all lands and improvements within the district and the cost thereof shall be apportioned and raised by taxation uniformly over the entire district in accordance with the assessed value of the real estate and improvements thereon within the district, but all construction work and improvements in the way of maintaining and operating the irrigation system in the entire district shall be deemed to be and are hereby declared to be for the benefit of all lands (excluding improvements) within the district and the cost thereof shall be apportioned and raised by taxation uniformly over the entire district in accordance with the assessed valuation of the lands (excluding improvements) within the district.

In ascertaining the above mentioned rates of taxation, fifteen per cent shall be deducted for anticipated delinquencies from the aggregate value of the property to be levied on in respect to each separate rate, as shown by the assessment roll of the district, and then the sum necessary to be raised shall be divided by the remainder of the proper aggregate assessed value. The secretary of the board must forthwith compute and enter in a separate column of the assessment roll the respective sums in dollars and cents to be paid on the respective properties therein enumerated.

Sec. 28*o*. A redemption of the property sold may be made by the owner, or any party in interest, within three years from the date of the sale, or at any time thereafter before a deed has been made and deliv-

ered. Redemption must be made in gold and silver coin; *provided,* that such redemption may also be made in whole or in part in warrants of the district, drawn by the auditor of said Riverside county prior to the first day of July, 1931, as to taxes levied prior to the year of 1930.

Warrants so received shall be canceled, and wherever necessary partial payment thereof may be endorsed thereon.

On receiving the certificate of sale, the county recorder must file it and make an entry in a book similar to that required of the collector. On presentation of the receipt of the collector of the total amount of the redemption money, the recorder must mark the word "redeemed," the date and by whom redeemed on the certificate and on the margin of the book where the entry of the certificate is made. If the property is not redeemed within the time herein provided, the collector, or his successor must make to the district a deed of the property, reciting in the deed substantially the matters contained in the certificate, and that no person redeemed the property during the time allowed by law by its redemption. The title acquired by the district may be conveyed by deed, executed and acknowledged by the president and secretary of the board of trustees, or said property may be sold on contract, with deferred payments, similarly executed and acknowledged; *provided,* that authority so to convey or contract must be conferred by resolution of the board, entered in its minutes, fixing the price and terms at which such sale or contract may be made, and for the purpose of

making such sales or contracts the district may employ an agent or agents; *and provided, further,* that property sold to the district for delinquent taxes may be redeemed as herein provided at any time before the district has disposed of the same.

Sec. 29. The collector shall deposit in the name of the district at least weekly in a reputable bank or banks in Riverside county all moneys for tolls or charges collected by him and originally made payable separately from taxes. Any portion of said tolls or charges originally made payable separately from taxes and collected for the purposes of paying principal or interest on bonds of the Palo Verde irrigation district, Palo Verde joint levee district or Palo Verde drainage district shall be forwarded by him to the county treasurer of Riverside county, as required in connection with tax moneys. All other portions of said tolls or charges originally made payable separately from taxes and collected shall be retained in said bank accounts and be used for the purposes for which they were collected upon order of the board of trustees and on checks in the name of the district signed by the president, vice-president, secretary, assistant secretary, superintendent and general manager or any two of said officers thereunto duly authorized by the board of trustees. The collector shall deposit daily in a reputable bank in Riverside county all moneys received by him for taxes and from tolls or charges which were originally made payable together with taxes to be placed in an account which shall only be drawn on by his checks payable to the county treasurer of Riverside county. All

moneys collected from the district, from taxes and from tolls or charges originally made payable together with taxes, shall be paid by the collector to the county treasurer of the county of Riverside and placed in the appropriate fund or funds in the name of the Palo Verde irrigation district. It shall be the duty of said county treasurer, upon presentation of any matured bond or interest coupon of any bond of any of said three districts, to pay the same from the appropriate fund. It shall be the duty of the county treasurer of Imperial county, if and when any funds derived from the collection of taxes collected by the county tax collector of said county under the provisions of section 28*a* of this act, upon any property within the district located in Imperial county, are paid over to him by the tax collector of said county, to transmit the same to the county treasurer of Riverside county, to be deposited by said last named treasurer in the appropriate fund or funds above mentioned. The county treasurer of Imperial county shall not be required to transmit said funds as they accumulate oftener than every thirty days. All payments required to be made by the district in pursuance of this act, except as herein otherwise provided, shall be made upon warrants drawn by the county auditor upon the appropriate fund and based upon itemized requisitions signed by the president and secretary or assistant secretary and one member of the board of trustees other than the president and secretary, and paid by the treasurer, but accurate account shall be kept by the board of trustees of the amount of funds on hand applicable to the particular

purpose for which taxes have been levied, or bonds sold, and each requisition shall show on its face the account to which the same is chargeable. The said auditor shall not become personally liable for the drawing of any warrant by reason of the fact that funds may not have been provided to pay the same.

Upon the requisition of the board of trustees, the auditor is authorized to draw a warrant from time to time, in favor of the district, for the purpose of providing an emergency fund for the payment of emergency expenses, including payrolls and current petty expenses, and the treasurer is authorized to pay such warrant, but the trustees shall cause the same to be deposited in a reputable bank to the credit of the district, and such fund may be disbursed on checks in the name of the district, signed by the president, vice-president, secretary, assistant secretary, superintendent and general manager, or any two of said officers as may be authorized by resolution of the board of trustees; *but provided, however,* that the amount on deposit in said emergency fund shall never exceed five thousand dollars, and an itemized statement of the disposition of same shall be made at least every thirty days, verified by the oaths of the president and secretary, and filed with the county auditor of Riverside county; *and provided, further,* that the board of trustees shall at all times keep in force a good and sufficient indemnity bond, executed by a reputable corporation authorized to engage in the business of executing fidelity bonds in the State of California, in an amount fixed by the board of trustees.

TITLE 43, SECTION 403 U. S. C. A.

§ 403. Refinancing agricultural improvement districts; loans by Reconstruction Finance Corporation authorized

The Reconstruction Finance Corporation is authorized and empowered to make loans as hereinafter provided, in an aggregate amount not exceeding $125,000,000, including commitments and disbursements heretofore made to or for the benefit of drainage districts, levee districts, levee and drainage districts, irrigation districts, and similar districts, mutual nonprofit companies and incorporated water-users' associations duly organized under the laws of any State or Territory, and to or for the benefit of political subdivisions of States and Territories which have or propose to purchase or otherwise acquire projects or portions thereof devoted chiefly to the improvement of lands for agricultural purposes. Such loans shall be made for the purpose of enabling any such district, political subdivision, company, or association (hereafter referred to as the "borrower") to reduce and refinance its outstanding indebtedness incurred in connection with any such project; or, whether or not it has any such indebtedness, to purchase, acquire, construct, or complete such a project or any part thereof, or to purchase or acquire additional drainage, levee, or irrigation works, or property, rights, or appurtenances in connection therewith, and to repair, extend, or improve any such project or make such additions thereto as are consonant with or necessary or desirable for the proper

functioning thereof or for the further assurance of the ability of the borrower to repay its loan: *Provided*, That the terms of this section shall not permit additional or new land to be brought into production outside of the present boundaries of any established or reorganized irrigation district. Such loans shall be subject to the same terms and conditions as loans made under section 605 of Title 15; except that (1) the term of any such loan shall not exceed forty years; (2) each such loan shall be secured by bonds, notes, or other obligations which are a lien on the real property within the project or on the assessments, taxes, or other charges imposed by the borrower pursuant to State law, or by such other collateral as may be acceptable to the Corporation; (3) the borrower shall agree not to issue during the term of the loan any other bonds so secured except with the consent of the Corporation; (4) the borrower shall agree, insofar as it may lawfully do so, that so long as any part of such loan shall remain unpaid the borrower will in each year apply to the repayment of such loan or to the purchase or redemption of the obligations issued to evidence such loan, an amount equal to the amount by which the assessment, taxes, and other charges collected by it exceed (a) the cost of operation and maintenance of the project, (b) the debt charges on its outstanding obligations, and (c) provisions for such reasonable reserves as may be approved by the Corporation; and (5) in the case of a loan to reduce or refinance its outstanding indebtedness, the borrower shall

agree, to the satisfaction of the Corporation, to reduce, insofar as it lawfully may, the annual taxes, assessments, and other charges imposed by it for or on account of the project by an amount proportional to the reduction in the corresponding annual requirements for principal and interest of its outstanding indebtedness by reason of the operation of this section. No loan shall be made under this section until the Reconstruction Finance Corporation (A) has caused an appraisal to be made of the property securing and/or underlying the outstanding bonds of the applicant, (B) has determined that the project of the applicant is economically sound, and (C) in the case of a loan to reduce or refinance the outstanding indebtedness of an applicant, has been satisfied that an agreement has been entered into between the applicant and holders of its outstanding bonds or other obligations under which the applicant will be able to purchase or refund all or a major portion of such bonds or other obligations at a price determined by the Corporation to be reasonable after taking into consideration the average market price of such bonds over the six months' period ending March 1, 1933, and under which a substantial reduction will be brought about in the amount of the outstanding indebtedness of the applicant. When application therefor shall have been made by any such district, political subdivision, company, or association any loan authorized by this section may be made either to such district, political subdivision, company, or association or to the holders or repre-

sentatives of the holders of their existing indebtedness, and such loans may be made upon promissory notes collateraled by the obligations of such district, political subdivision, company, or association or through the purchase of securities issued or to be issued by such district, political subdivision, company, or association. (May 12, 1933, c. 25, Title II, § 36, 48 Stat. 49, as amended June 16, 1933, c. 101, § 19, 48 Stat. 308; June 19, 1934, c. 653, § 11, 48 Stat. 1110; June 27, 1934, c. 851, 48 Stat. 1269; June 22, 1936, c. 702, §§ 1, 2, 49 Stat. 1818.)

LEGAL OPINION OF O'MELVENY, MILLIKIN & TULLER.

"Los Angeles, August 30, 1918.

Gentlemen:

Responding to your request that we advise you as to the method to be followed under the law to provide funds to pay the principal and interest of bonds proposed to be issued by the Palo Verde Joint Levee District of Riverside and Imperial Counties in the amount of $1,285,951.86, and which were authorized at an election held in said District January 30, 1918, we beg to advise you as follows:

These bonds are to be issued under the provisions of an Act of the Legislature of this State approved March 9, 1911, and amended by an act approved May 22, 1917. Section 9 of said act, as amended, contains provisions providing for the raising of money to pay the principal and interest of the bonds. We quote therefrom as follows:

> 'In the event the said district comprises land situated in more than one county, then said estimate shall be furnished to the board of supervisors of each of the counties within which said lands of said district are situated. In such case at the time when by law it is the duty of the board of supervisors of said respective counties to fix the annual tax rate of each county, it shall be the duty of the board of supervisors of each of said counties respectively to levy a tax upon the taxable property in such levee district as may be situated in said county for the interest and redemption of said bonds, and such tax must not be less in the aggregate than sufficient to pay the

interest on said bonds for that year and such portion of the principal as is to become due during such year, and such portion of the principal that at the end of ten years the sum raised from such levies shall equal at least twenty-five per cent of the amount of bonds issued, at the end of twenty years at least fifty per cent of the amount, and at and before the date of maturity of the bonds, shall be equal to the whole amount of the principal, and the money arising from such levies shall be known as the bond fund and shall be used for the payment of bonds and interest coupons and for no other purpose whatever. The county treasurer of each county shall open and keep in his book a separate and special account which shall at all times show the exact condition of such bond fund. Such tax *shall be levied on all property in the territory* comprising the district situated in said county, *and shall be collected at the same time and in the same manner and form as county taxes are collected,* and when collected shall be held by the treasurer of each of said counties. Upon the first days of January, April, July and October of each year succeeding the date of issuance of said bonds, the county treasurer of each county, other than the county wherein the larger portion of the lands of said district is situated, shall transmit to the county treasurer of the county in which the larger portion of the lands of said district is situated all sums then in his possession in said bond fund, and the county treaurer of the county in which the larger portion of the lands of said district is situated shall issue his receipt therefor. Such taxes *shall be a lien upon all the property within the territory comprising the district, and of the same*

force and effect as other liens for taxes, and the collection of said taxes shall be enforced by the same means and in the same manner as provided by law for the enforcement of liens for county taxes.'

The estimate to be furnished to the board of supervisors set forth in the first part of the quotation above set out, is an estimate certified by the board of trustees of the district to the respective boards of supervisors each year, stating the amount of interest upon all outstanding bonds to grow due within the year and the amount of moneys necessary to redeem any or all outstanding bonds that may grow due in said year.

You will observe that, generally speaking, the law provides for the raising of money to pay the principal and interest of the bonds of this character by a levy upon taxable property within the district. It would probably be of interest to you also to know, if you are not already advised thereof, that the act above referred to, as amended, contains the further provision that all bonds issued by such a district shall have '*the same force, value and use as bonds issued by any municipality and shall be exempt from all taxation within the State of California*', and it is further provided by the act that the bonds shall have 'all the qualities of negotiable paper under the law merchant'.

We believe the foregoing covers your inquiry.

Very truly yours,

O'Melveny, Millikin & Tuller,

By Henry J. Stevens."

FINAL OPINION.

"Los Angeles, May 21, 1926.

Subject: Palo Verde Irrigation District Bonds, 1925—First Issue.

Messrs. J. R. Mason & Co.,
San Francisco, California.

Messrs. Alvin H. Frank & Co.,
Los Angeles, California.

Gentlemen:

We have examined at your request, and at the request of the Palo Verde Irrigation District, certified copies of the proceedings covering the formation of the Palo Verde Irrigation District of the State of California, and also covering the bond issue by said District in the amount of $3,287,000 designated as "First Issue", and sale to you of $38,000 of bonds of said First Issue. We have also examined supplementary documents furnished us and executed Bond No. 2107 of said issue. We have further examined the decision of the Supreme Court of the State of California in the case of Barber v. Galloway, 68 C. D. 437. Said $38,000 of bonds are issued pursuant to an election held August 28, 1925, and consist of 38 bonds, each of the denomination of $1,000, and are dated September 1, 1925, and bear interest at the rate of six per cent per annum, payable on January first and July first of each year. Said $38,000 of bonds are numbered and mature as follows:

Numbers Inclusive:	Maturities:
715 - 719,	July 1, 1945;
1610 - 1627,	July 1, 1949;
2102 - 2111,	July 1, 1951;
3150 - 3154,	July 1, 1955.

From this examination we are of the opinion that the proceedings have been taken in accordance with the laws and constitution of the State of California, and that said $38,000 of bonds having been executed by the proper officials and delivered to and paid for in the manner provided by law, constitute in your hands the legal and binding general obligations of said Palo Verde Irrigation District, and that said bonds shall be payable from ad valorem taxes upon all of the lands with the improvements thereon in said Palo Verde Irrigation District and said taxes will be of equal importance and priority as a lien upon said lands and improvements thereon as general county taxes.

O'Melveny, Millikin, Tuller & MacNeil,
By (Signed) Paul E. Schwab.

PES B"

No. 9133

In the United States Circuit Court of Appeals

For the Ninth Circuit.

7

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation),

Appellants,

vs.

PALO VERDE IRRIGATION DISTRICT, an Irrigation District,

Appellee.

APPELLEE'S BRIEF.

STEWART, SHAW & MURPHEY,
ARVIN B. SHAW, JR.,
WM. L. MURPHEY,
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No. 9133

In the United States Circuit Court of Appeals

For the Ninth Circuit.

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation),

Appellants,

vs.

PALO VERDE IRRIGATION DISTRICT, an Irrigation District,

Appellee.

APPELLEE'S BRIEF.

This brief is submitted by appellee in response to appellants' opening brief. Appellants correctly state (Op. Br. p. 2) that at the trial of the cause in the court below they made three objections to the relief herein sought by petitioner district. This court will note that appellants' opening brief herein contains the argument of fourteen propositions, eleven of which were not presented to the trial court.

Appellants' statement of facts (Op. Br. pp. 3 to 8) is, in the main, factually accurate. Appellee considers, however, that it is its duty to furnish the court with a more ample statement of facts, bearing largely upon the economic condition of appellee, which has caused the filing of this proceeding for relief by composition of its debts,

and giving particular consideration to the historical and physical background for such economic condition and the efforts made by appellee to rehabilitate itself. It is considered that this court should know fully the condition of distress which it is asked to relieve, in order that it can measure such condition by the standards of the statute (Title 11, U. S. C., Secs. 401 to 404; Secs. 81 to 84, Bankruptcy Act of 1898).

Statement of Facts.

Palo Verde Irrigation District comprises practically all of the Palo Verde Valley. This valley is a more or less lens-shaped strip of land lying along the west bank of the Colorado River, in the extreme easterly end of Riverside County, California, and is about thirty-five miles long, with a maximum width of about seven miles. It is an alluvial river-bottom, lying between the river on the east and a high mesa on the west. By deposition of silt in its bed, the river has gradually built the bed up so that it lies on a plane above the valley. The valley slopes to the west from the river and to the south along it. [History and physical data herein are largely drawn from the testimony of E. F. Williams, Tr. pp. 184, 194, and C. P. Mahoney, Tr. p. 198.]

The climate of the valley is hot and arid. The term "hot" is illustrated by the cautious statement of one witness that "Summer temperatures very seldom go above 122 degrees". [Tr. p. 188.] The term "arid" means that the average annual rainfall is between two and three inches and sometimes there is practically no rainfall for a year or two.

About 1877 one Thomas H. Blythe, of San Francisco, acquired about 40,000 acres in the valley lying along the river front and made the first water appropriations on the Colorado River in California. He initiated the beginnings of an irrigation system and did some farming. He died in 1883. The litigation over his estate is evidenced by dozens of decisions of the State and Federal Courts. It came to an end about 1904. At that time Palo Verde Land and Water Company acquired the Blythe Ranch. In 1908 it organized Palo Verde Mutual Water Company, which proceeded to lay out and operate an irrigation system throughout the valley and a rudimentary levee system along the river. The Mutual Water Company made a bond issue.

The gradual rising bed of the river led to floods in the valley and it was realized that extensive levee construction was necessary to save the valley. [Tr. p. 185.] Palo Verde Joint Levee District of Riverside and Imperial Counties, California, was organized in 1915 for this purpose and made two bond issues. Notwithstanding construction of the new levees, the riverbed continued to rise and floods continued to devastate the valley. In 1922 occurred the most disastrous flood, in which two-thirds of the valley was inundated, with damage exceeding one million dollars and with much of the land under water for several months.

By 1921 the pressure of the waterplane of the rising river led to the rising of the underground watertable in the valley, with the result that construction of drainage works was necessitated in order that farming might continue. Palo Verde Drainage District was organized in 1921 and issued bonds for the construction of drainage ditches. [Tr. p. 185.]

In 1923, for the major purpose of coordinating the work of the three previously existing organizations and reducing overhead expense, the State Legislature, by a special act (Palo Verde Irrigation District Act, Stat. Cal. 1923, p. 1067) authorized the merger of the Levee District and Drainage District into the present Palo Verde Irrigation District and the acquisition by the latter of the irrigation system of the Mutual Water Company. Such merger and acquisition were consummated. The Irrigation District, in order to extend and complete the levee and irrigation systems, issued bonds in 1925.

The boundaries of the Levee District and Drainage District were practically coterminous, although there were a few small areas that were in one and not in the other. The boundaries of the new Irrigation District, however, included all lands of each of the old districts.

In 1904 there were very few people in the Palo Verde Valley. The land was covered with a jungle growth. [Tr. p. 185.] A considerable influx of settlers took place, principally between 1916 and 1920. [Tr. p. 308.] During the years of the World War, and for a year or two thereafter, farming in the valley was reasonably profitable, but, owing to the increase in the load of debt upon the farmers, it was carried on at constantly increasing costs.

After the great flood of 1922 a great many of the people who had been flooded out did not come back to their farms. [Tr. p. 308.] The era of diminishing returns for agricultural products set in. Gradually farmers, who had sunk all they had in their farms and who could no longer finance their taxes and the cost of farming, began to drift out of the valley. After 1926 this process went on rather rapidly. [Tr. pp. 308, 312.]

In 1926 the acreage in cultivation reached its peak, 36,135 acres (subject to reduction on account of double-cropping some lands). The decline of the acreage in production proceeded steadily and in 1933 the gross acreage in cultivation was 21,117 or 58% of the maximum. [Ex. 24, Tr. p. 257.] The district's tax rates steadily pyramided. In 1928 and 1929 they were around $17.00 per $100.00 assessed valuation ($100.00 per acre being the maximum assessed valuation). [Tr. p. 258.] During this period of excessive tax rates the farmers paid out for taxes, costs of farming and living expenses, more than they took in from the sale of their crops. Those who could, borrowed money on the security of their land or any other credit they had and paid until their credit was exhausted. [Tr. p. 312.] At the same time, from 1927 to 1932, the percentage of land delinquent for district taxes mounted as follows:

1927,	26.37 per cent
1928,	31.49 " "
1929,	55.76 " "
1930,	97.38 " "
1931,	99.28 " "
1932,	99.21 " " [Ex. 25, Tr. p. 258.]

This tabulation evidences the galloping disease of insolvency of the district and shows how inevitably, as soon as more than half the land was delinquent, a complete collapse in the tax-collecting function must occur. Practically no redemptions took place. [Ex. 26, Tr. p. 260.]

The district, beginning May 1st, 1930, was obliged to default in payment of all bonds which it had issued and assumed. The situation, as to whether the district could

continue operating its irrigation system, was desperate. By various expedients, including the levy of water tolls upon the residue of the farmers who still remained on the land and the reduction by half of the former costs of operation, the operation of the system was carried on during the years after the default. [Tr. p. 252.] Under these circumstances a few of the bondholders, of whom the five appellants in this case are the intransigent residue, commenced harassing the district with suits on their bonds. Incidentally, not one of these suits has to this date gone to final judgment.

The farmers and the district, very shortly after the collapse occurred in 1930, commenced to cast about to ascertain their real condition and their real ability to pay and to find a way out of their plight. The following steps were taken:

1. The district appointed a committee to try to get federal aid. This committee met with Dr. Elwood Mead, Commissioner of the Bureau of Reclamation, and other officials of the bureau. Upon their suggestion, the district was taken into a relief survey of seventeen irrigation projects being made by the federal government. Hearings were held before the House Committee on Irrigation and Reclamation of the Seventy-first Congress, but the bill proposed to relieve the seventeen projects was not passed. [Tr. pp. 194, 195.]

2. Thereafter the committee advised with Congressman Phil D. Swing, who recommended attempting a separate bill for relief of the district. To prepare for such an effort, a fact-finding committee of six or seven persons in the valley made a careful investigation of the financial condition of the valley and the earning capacity of the lands

in the district and sought to find farming methods by which production in the valley could be improved by building up the fertility of the soil. The University of California, at the request of the district, send Professor R. L. Adams, who made an economic investigation and report. [Tr. p. 195.]

3. The district, early after the default, sought to come into discussion with its bondholders as a group and, for that purpose, suggested the formation of a bondholders committee. This committee sent an engineer, who made a survey of the valley. [Tr. p. 195.]

4. A committee of four went to Sacramento and met with the Director of Public Works and State Engineer, who made a report regarding the valley to the Secretary of the Interior. Congressman Swing introduced a bill calling for a grant of a million dollars to be paid to the bondholders, on condition that the latter consent to a reduction of the indebtedness to a sum found by the Secretary of the Interior to be not in excess of the district's ability to pay. Witnesses appeared for the district before the House Committee on Irrigation and Reclamation in support of the bill. The Secretary of the Interior and Commissioner of Reclamation recommended the passage of the bill. The committee made a report approving the bill but it was not passed. [Tr. pp. 194, 195.]

5. The district, after the failure of this bill, continued negotiations with the bondholders' committee toward an adjustment of the debt. On August 18th, 1932, a novel arrangement was agreed upon, by which the district leased all its tax-deeded land to the bondholders, with an option to acquire the same within five years, in exchange for cancellation of all the bonds. The bondholders, on their

side, were required to sublease the land back to the former owners thereof upon moderate terms and to re-sell to the former owners upon a basis which contemplated that, over a period of twenty years or more, as the lands might be re-sold, the bondholders might have recovered approximately forty per cent of the face value of their bonds, disregarding interest. [Tr. pp. 198, 199.]

6. In May, 1933, the Congress enacted Section 36 of the Emergency Farm Mortgage Act, authorizing Reconstruction Finance Corporation (hereinafter called "R. F. C.") to make loans for the refinancing of drainage, levee and irrigation districts. The sum of $50,000,000, later increased to $125,000,000, was appropriated for that purpose. In July, 1933, the district filed with R. F. C. its application for such a loan. The loan was rejected but later reconsidered and on March 1st, 1934, R. F. C. adopted resolution authorizing a loan to the district in the amount of $1,039,423.00, upon certain exacting and voluminous conditions. [Tr. pp. 201 to 223.] The principal amount of the district's debt at the time was $4,178,330.36. The resolution contemplated refinancing the bonds on the basis of 24.81 cents per dollar of principal, disregarding interest. A small balance of the proposed loan, about $2500.00, was authorized to be used for certain expenses of the refinancing process, bond counsel's opinion, engraving bonds, etc. The proposal made in the R. F. C. resolution was submitted to the bondholders' committee, which by that time had on deposit about eighty-seven per cent of the bonds of the three districts. The bondholders came to the conclusion that they preferred cash in the amount of 24.81 cents per dollar rather than the somewhat uncertain prospect of being able to recover over a period of

twenty or more years what they might salvage under the agreement of August 18th, 1932. [Tr. pp. 199, 200.]

7. The bonds of the Mutual Water Company, $170,000 in amount, or about 4% of the whole debt, were secured by private trust deed executed by the company. This trust deed constituted a first lien upon the irrigation system, and, being in default, was subject to foreclosure at any time. The holders of these bonds considered themselves to be in a preferred position and insisted upon payment at the rate of fifty cents per dollar for their bonds. An approach was made to the R. F. C. to permit this alteration of the terms of its resolution, but such change was refused. Thereupon the group representing the bonds of the three districts agreed that from the money to be paid for their bonds should be deducted enough to increase the payment to the Mutual Water Company bondholders to fifty cents, which left the amount payable for district bonds at 23.248 cents per dollar. [Tr. pp. 223, 224.]

8. The district board, by resolution, accepted the proposed loan and submitted to the voters at an election the proposition whether a refunding bond issue in the amount of $1,039,432.00 should be approved. The voters approved the refunding bonds on June 15th, 1934. [Tr. p. 223.] Under date of August 7th, 1934, two contracts were executed between R. F. C. and the district looking toward the conclusion of the proposed loan. These contracts, however [Exhibit 19, Tr. p. 225, and Exhibit 20, Tr. p. 236], specifically provided that the R. F. C. might purchase the old securities; that when *all* the old securities were acquired by the corporation the loan should be consummated and the refunding bonds issued and that prior to the time all the old securities were so acquired the district

should pay the Corporation four per cent on the amounts theretofore disbursed by it, but that the Corporation could at any time require the district to pay in full the amount due on the old securities according to the terms thereof.

9. On October 31st, 1934, the R. F. C. disbursed, through the Federal Reserve Bank at Los Angeles, approximately $1,000,000, pursuant to its instructions to the Federal Reserve Bank to *purchase* the bonds in question. The R. F. C. thus acquired approximately $3,960,000 of the old securities, or more than ninety-four per cent in amount of all the old securities and more than ninety-two per cent in amount of each of the several bond issues here involved. By successive additional purchases, R. F. C. has acquired and held at the date of the trial in the court below $4,043,730.36 face value of the old securities, or 96.76 per cent, and more than 95 per cent of each individual issue. The non-assenting and unknown bondholders held bonds aggregating $134,600.00, or 3.24 per cent. Of this amount the appellants herein hold $79,000.00, or 1.88 per cent. [Tr. pp. 166, 169, 224.]

10. The holders of the bonds issued by the Palo Verde districts shared the same fortune as the farmers. After the default in May, 1930, trading on the market in these bonds was "flat", that is, the price did not take into account the amount of accumulated unpaid interest. Schedules of sales made up by a bond dealer specializing in these bonds show that in 1930 and 1931 the bonds sold at 10 to 14 per cent of principal. From 1931 to the beginning of 1933 they gradually declined to 2. $20.00 cash would buy a bond of the face value of $1000.00, with all unpaid coupons attached. The schedules show twenty-two sales at prices from 2 to 5. After the announcement of the

proposed R. F. C. loan, the market price of the bonds slowly increased to 21½ on November 1, 1934. Thereafter no sales have been made.

(Exhibit 4, containing the schedules of Palo Verde bond sales above mentioned, is printed in the appendix to this brief, commencing at page 1.)

11. On March 29th, 1935, the district filed a petition for readjustment of its debts, under Section 80 of the Bankruptcy Act, in the United States District Court for the Southern District of California. A hearing was held in October, 1935, and the United States District Judge thereafter filed his opinion, holding that the plan of readjustment was fair and equitable and should be approved. The findings and decree were prepared and on his desk for signature at the time the Supreme Court of the United States rendered its decision in *Ashton v. Cameron County Water Improvement District No. 1,* 298 U. S. 513. Solely by virtue of the unconstitutionality of Section 80, as determined by the Supreme Court, the District Judge dismissed the proceeding, and this court, upon the same ground, dismissed the district's appeal. [Tr. pp. 295, 298.]

12. Thereafter, appellants herein, except Covell, on December 29th, 1936, obtained an *alternative* writ of mandate from the Superior Court of Riverside County, directed to the district, its officers and its depositary, commanding them to pay appellants' claims on their bonds before making any payment to the R. F. C., or, in the alternative, to show cause why they should not do so. The district, its officers and depositary did show cause by demurrer, which demurrer was sustained by the Superior Court. An amended petition was filed by appellants herein

but no further proceedings have been held in this cause. [Tr. pp. 303, 306.]

13. The 1937 California Legislature adopted an act designated the "Irrigation District Refinancing Act" (Stats. Cal. 1937, Chap. 24), under which a court proceeding for the relief of collapsed irrigation districts was authorized. This proceeding, briefly, was to be initiated by the petition of the district, setting forth a proposed plan of readjustment, followed by notice to the bondholders and a first or preliminary hearing before the trial court, in which the court should examine into the merits of the proposed plan and determine whether it was fair, equitable and for the best interest of the creditors affected thereby. If the court should so hold, then an interlocutory decree to that effect was to be entered. The proceeding was then to be continued for a second phase, which, in essence, should be a hearing for the condemnation of the bonds held by the non-assenting creditors. The fair value of the bonds was to be determined and, upon payment thereof, a final decree of condemnation was to be entered. [Op. Br. Appendix p. 1.]

14. The district, in April, 1937, filed in the Superior Court its petition under the above mentioned act. Appellants herein answered and a trial was held, covering approximately a week, in November, 1936. On April 25th, 1937, the Superior Judge filed his opinion, holding the act constitutional and holding the plan of readjustment to be fair, equitable and for the best interests of the creditors, and directed findings to be prepared accordingly. On the same day that this opinion was received by counsel the Supreme Court of the United States, in *United States v. Bekins*, 304 U. S. 27, in a proceeding involving Lindsay-

Strathmore Irrigation District of Tulare County, California, held Sections 81 to 84 of the Bankruptcy Act constitutional. Sections 81 to 84 had been enacted August 16, 1937, *after* the commencement of the proceeding in the state court. Its constitutionality was in doubt until the decision in the *Bekins* case.

15. Faced with the alternatives of proceeding further under the state act and testing through the higher courts the constitutionality thereof, which appellants herein vehemently assailed, or dismissing that proceeding and filing a peition under Sections 81 to 84 of the Bankruptcy Act, the district took the latter alternative. The Superior Court granted a motion to dismiss without prejudice the proceeding in that court. The District Court accepted jurisdiction of the petition under Sections 81 to 84. A hearing on this petition was held on July 18, 1938. On August 4, 1938, the District Judge filed his opinion, holding again that the plan was fair, equitable and for the best interests of the creditors, and findings and interlocutory decree were entered accordingly.

16. At none of the three court hearings which have been held in connection with these three successive proceedings for the refinancing of the district has any objector put on a single witness to controvert the factual showing made by the district that it is unable to pay its debts as they mature or that the suggested plan is fair, equitable and for the best interest of the creditors themselves. Beyond a few documents of minor importance, appellants have offered no evidence. The trial judges have successively held in the three cases that the plan represents the best that can be done for the creditors and is fair.

17. By 1934, 72.96 per cent of the lands in the district had been deeded to the district for delinquent taxes, and in the following year an additional 26.69 per cent, making an aggregate of 99.66 per cent, were likewise deeded to the district. [Ex. 28, Tr. p. 264.] By 1937 81.4 per cent of the lands in the district were likewise deeded to the state for delinquent county taxes. [Ex. 37, Tr. p. 285.] It was evident as early as 1934 that, in addition to the re-financing of the bonds, it was imperative that measures be taken to return the lands in the district to private owner-ship, in order that the district might continue to function and be able to collect a tax income. The necessity of such measures also existed because it was essential that the remaining farmers of the valley regain in some manner title to the lands which they had lost. Without title to their lands they could not be held together to form a nucleus for the rehabilitation of the district. Accordingly, after mature deliberation and study of the problem by the district board and a number of committees, a plan was adopted by the district board and approved by the Boards of Supervisors of Riverside and Imperial Counties, the State Controller of California and the Reconstruction Finance Corporation. Under this plan, approximately 49,000 acres of the 89,000 acres in the district were resold to the former owners at a price of five per cent of the 1929 assessed valuation, or a maximum of $5.00 per acre. A second plan was later adopted, under which the former owners were given a second opportunity to buy at an in-creased price, twenty-five per cent of the assessed valua-tion, but only two or three such purchases were made. Under a third plan, placed in effect in 1936, the district has sold several thousand acres of additional land, mostly wild brush land, for an average price slightly under $8.00

per acre, but with the requirement that the purchaser improve the land for cultivation. The contracts under these three plans contain conditions subsequent for forfeiture of the title unless the current district and county taxes were paid. The experience of the district and the county since 1934 has been that the taxes levied have been paid. The area in cultivation has gradually been increased until in 1937 (after allowing for land farmed to two successive crops) there were 29,300 acres in cultivation. [Tr. pp. 269 to 274.]

The present economic situation in the valley may be summarized as follows:

The major crops are cotton and alfalfa. [Ex. E, Tr. p. 254.] Cotton, the larger in acreage, has been seriously damaged in recent years by an insect infestation and will have to be reduced. [Tr. pp. 182, 310, 311.] Alfalfa also has suffered from pests. [Tr. p. 311.] Present costs, district tax and water toll, have aggregated $5.50 to $7.50 per $100.00 assessed valuation or per acre. [Tr. p. 269.] Five farmers of many years' experience testified that the land could not produce enough to stand a tax and toll greater than from $5.50 to $7.00 per acre. [Tr. pp. 309, 312, 313, 321, 322.] Expert witness W. D. Wagner testified to $7.00 per acre. [Tr. p. 288.] The maximum eventual acreage cultivated will be about 40,000 acres. [Tr. pp. 187, 288.]

If a writ of mandamus were issued, requiring a tax levy for 1937-38 to raise all matured principal and interest on the outstanding bonds, the amounts necessary to be raised would be, for principal, $931,500.00, and for interest, $2,024,317.51, or an aggregate of $2,954,817.51. The tax

rate necessary to raise this sum would be $112.17 per $100.00 assessed valuation. [Ex. 30, Tr. p. 267.]

Assuming that this rate were levied and paid in full, the unpaid maturities of principal on the remaining bonds would amount to $3,242,830.36. [Tr. p. 266.] The future tax rates to pay maturing bonds and interest alone would be as follows:

1938	$14.41 per $100
1939	14.37
1940	14.85
1941	15.05
1942	15.09
1943	13.06
1944	12.69
1945	12.31

If the district tax, *plus* water toll and county tax, were to be raised to $12 or $15 per acre, "there would be no farming at all. The farmers would abandon their places wholesale and try to get them a job." [Tr. p. 314.] As another witness put it: "If the taxes and toll were raised to $10 the farmers would go somewhere else." [Tr. p. 321.] "The system would have to be abandoned for lack of revenue." [Tr. p. 322.]

Considerable capital expenditure, for drainage, reconstruction of wooden structures on canals, equipment, etc., confronts the district. [Tr. pp. 249 to 251.] The district is still operating ten 1917 to 1927 model "T" Ford trucks. [Tr. p. 250.]

ARGUMENT.

A. APPELLANTS ARE NOT ENTITLED TO URGE ELEVEN OF THEIR FOURTEEN POINTS.

We quote from appellants' opening brief (p. 9):

> "When the cause came on for hearing before the District Judge objections to the introduction of any evidence were made [Tr. p. 148] on the grounds that as shown by the facts admitted (1) there was a proceeding pending in insolvency under the state law; (2) the cause was *res judicata;* (3) the plan had been carried out, out of Court. This objection was overruled."

The same three points are stated in more amplified form in the transcript of the hearing [pp. 148, 149].

There was no argument before the trial court on any points other than the three mentioned above.

In this Court, appellants file an opening brief of 120 pages with an appendix of 88 pages, in which they present to this Court 14 points, which include the three above mentioned. These points are summarized (Op. Br. pp. 10, 11) as follows:

> "The interlocutory decree confirming the plan of composition herein should be reversed because:
>
> "1. The District Court was without jurisdiction to enter its decree touching the governmental and fiscal affairs of the Palo Verde Irrigation District, by the terms of Chapter IX;
>
> "2. The pendency of the insolvency proceeding under Cal. Stats. 1937, Chapter 24, was a bar to these proceedings;

"3. The cause is *res judicata;*

"4. The R. F. C. is not a creditor affected by the plan and cannot vote upon the proposition;

"5. The plan had already been consummated long prior to the filing of the petition;

"6. The judge failed to classify the creditors properly;

"7. The plan is grossly unfair and inequitable;

"8. The plan is not proposed in good faith;

"9. The State of California is the owner of the assets and may not repudiate its public debts, nor can the district, a public trustee, take bankruptcy;

"10. Trust funds and property are unlawfully taken by the proceeding;

"11. The liability of juristic persons not before the Court is unlawfully voided;

"12. The district is not authorized by law to carry out the plan.

"13. The State of California cannot under its own Constitution consent or be a party to these proceedings;

"14. Chapter IX is unconstitutional as applied in these proceedings."

By comparison it will be observed that points 2, 3 and 5 above listed were the points urged in the trial court. Appellee respectfully submits that appellants are not entitled to urge upon this Court contentions which were not brought to the attention of the District Judge, which were not therefore considered or ruled upon by him, and as to which appellee had no opportunity to furnish light by additional evidence.

It is settled by innumerable cases both in the federal and state courts that an appellate court will ordinarily not consider points which were not urged in the trial court.

As long ago as 1843, the Supreme Court in *Bell v. Bruen,* 1 How. 169, 187, 11 L. ed. 89, 96, held, with respect to a contention:

> "The record shows that this ground of defense was not brought to the consideration of the Circuit Court; we do not therefore feel ourselves at liberty to express any opinion upon the question."

The Court says as to a second contention:

> "To this, and all other questions raised here, on which the court below was not called to express any opinion, we can only give the same answer, given to the next preceding, supposed ground of defense."

The Court says of an appellant's contention in *Virtue v. Creamery Package Mfg. Co.,* 227 U. S. 8 at p. 38, 57 L. ed. 393, 407:

> "But the contention was not made in the circuit court, nor was it made in the circuit court of appeals. . . . It is manifest, therefore, that the separate liability of the Creamery Package Manufacturing Company is an afterthought and urged in this Court for the first time." (Judgment affirmed.)

In *Duignan v. U. S.,* 274 U. S. 195, 200, 71 L. ed. 996, the Court says, in refusing to consider a constitutional point which appellant raises for the first time on appeal, in challenging the equity jurisdiction of the Court:

> "This court sits as a court of review. It is only in exceptional cases coming here from the federal courts

> that questions not pressed or passed upon below are reviewed." (Citing eight decisions of the Supreme Court.)

The same rule has been repeatedly followed by the various Circuit Courts of Appeals.

In *Supreme Forest Woodmen Circle v. City of Belton, Tex.*, 100 Fed. (2d) 655 (C. C. A. 5), which was a case rising under the same Act as the present proceeding, the contesting creditors of the city urged in the Circuit Court of Appeals two contentions raised in the trial court, and two other points not raised below. As to the new points the Court holds at page 658:

> "We need not sharpen our pencils to determine whether, if these warrants are excluded from the count, there would remain the required 66⅔% of acceptances. Nor need we consider whether the article appellants invoke has been superseded by that on which the appellee relies. For we think appellants are in no position to press these points here against the order.
>
> "We think this is so, because appellants did not make their point below in any form; . . ."

In *Deutser v. Marlboro Shirt Co.*, 81 Fed. (2d) 139 (C. C. A. 4), the Court holds at page 143:

> "It is well settled that only in very exceptional cases can a point not brought to the attention of the court below and not passed upon by that court be raised upon appeal." (Citing two U. S. cases and three cases from 4th Cir.)

In *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 Fed. (2d) 742 (C. C. A. 9), the Court holds at page 571:

> "Neither of these contentions were presented to the trial court. It was assumed in the trial court that the statute of limitations was properly pleaded, . . . In any event, therefore, appellee cannot here claim waiver, having treated appellants' plea of the statute as sufficient upon the trial."

In *Potts v. City of Utica*, 86 Fed. (2d) 616 (C. C. A. 2), the Court at page 619, referring to a point raised for the first time on appeal, holds:

> "It is enough to dispose of this point that it was not raised on the trial. . . ."

Authorities might readily be multiplied. The soundness of the reasons of policy upon which the above mentioned cases rest can hardly be disputed. Appellants should not be permitted to hold "trick" points behind their backs in the trial court and reserve them for the appellate courts. This practice is neither fair to the trial court nor to the appellee, and is not conducive to the prompt or efficient administration of justice.

The foregoing argument is not written, however, because appellee has no answers to the new points raised by appellants in this Court. Appellee proposes hereinafter to outline the answers to all of appellants' points so that this Court may see that no fundamental miscarriage of justice would ensue if the rule hereinabove contended for is applied.

To avoid confusion the following discussion of appellants' fourteen points is arranged under the successive headings used in appellants' opening brief, which headings are hereinafter quoted.

B. APPELLANTS' FOURTEEN POINTS.

First Proposition: "By the Terms of the Statute the Court Was Without Jurisdiction."

This point is among those not raised in the trial court.

Appellants build their argument upon the terms of the clause in Section 83(c) of the Bankruptcy Act (11 U. S. C. 403c), which provides that the Court "shall not, by any order or decree, in the proceeding or otherwise, *interfere with* (a) any of the political or governmental powers of the petitioner; . . ." They urge that, because any order made under the section must interfere with such powers, the appellee can have no relief under the act.

Appellants argue this proposition through 20 pages of their brief (pp. 11 to 30). They labor to ascertain whether there was any difference between the former Chapter IX of the Bankruptcy Act, which the Supreme Court held unconstitutional in *Ashton v. Cameron Co. Water Improvement District No. 1,* 298 U. S. 513, 80 L. ed. 1309, and the present Chapter IX, which was held constitutional in *U. S. v. Bekins,* 304 U. S. 27, 82 L. ed. 1137, and whether the Supreme Court in the *Bekins* case overruled the *Ashton* case. It appears to us that the answer to appellants' proposition is very clear and simple. The Supreme Court of the United States in the *Ashton* case held the former Chapter IX unconstitutional and its decision in that respect has been followed without question by the Circuit and District Courts throughout the country.

This Honorable Court has repeatedly followed the *Ashton* decision as the law (*e. g., In re Imperial Irrigation District,* 85 Fed. (2d) 1019, 87 Fed. (2d) 355: *Semble, Chicot County Drainage District v. Baxter State Bank* (C. C. A. 8), 103 Fed. (2d) 847). Also the Congress, in effect, recognized the decision in the *Ashton* case. In adopting the Chandler Act in 1938 (52 Stat. 840) it renumbered Sections 81 to 84 as Chapter IX, in place of the original number, Chapter X, thus admitting that old Chapter IX was not law.

In the *Bekins* case the Supreme Court squarely and explicitly held that a California irrigation district, the Lindsay-Strathmore Irrigation District, was constitutionally entitled to the relief provided by Sections 81 to 84. The Lindsay-Strathmore District was organized under the California Irrigation District Act. Appellee was organized under a special act of the California Legislature, designated the Palo Verde Irrigation District Act. The structure and details of the two acts are, in the main, the same. Both acts are authorized by Article XI, Section 13, of the State Constitution of California. (*Palo Verde Irr. District v. Seeley,* 198 Cal. 477 at p. 483.)

The Palo Verde Irrigation District Act was held constitutional by the state Supreme Court in *Barber v. Galloway,* 195 Cal. 1.

In 1932 companion cases brought by three irrigation districts organized under the California Irrigation District Act and by the Palo Verde District were decided by the state Supreme Court. In *Palo Verde Irrigation*

Dist. v. Jamison, 216 Cal. 740 at p. 741, the Court said, referring to the Palo Verde Act:

> "We find no substantial difference between the provisions of this act, subsequent to said amendment of 1927, and the said California Irrigation District Act, sufficient to warrant a distinction between this case and the said three companion cases."

The essential nature of the districts organized under the two acts mentioned is, for all purposes involved in the present case, identical. Appellants have not indicated any differentiation between the two acts. The Supreme Court has held in the *Bekins* case that, under Sections 81 to 84 of the Bankruptcy Act, the Court has jurisdiction to grant to the Lindsay-Strathmore Irrigation District the relief provided by Sections 81 to 84 of the Bankruptcy Act. This being true, the District Court likewise had jurisdiction to grant the same relief to the Palo Verde District.

We are not particularly concerned with the ramifications of appellants' argument as to the governmental or political character of appellee. It should be pointed out, however, that the district involved in the *Ashton* case was held to be a political subdivision and that Section 79 of old Chapter IX classified all the taxing agencies to which the act applied as a "municipality or other political subdivision" of a state. The California Supreme Court has repeatedly held that a California irrigation district is not

a municipal corporation or a political subdivision of the state.

> *Wood v. Imperial Irrigation Dist.*, 216 Cal. 748, 752, 753;
>
> *Turlock Irr. Dist. v. White*, 186 Cal. 183, 187;
>
> *Whiteman v. Anderson-Cottonwood Irr. Dist.*, 60 Cal. App. 234, 237;
>
> *El Camino Irr. Dist. v. El Camino Land Co.*, 96 Cal. Dec. 505, 508.

Coming back to the clause of Section 83(c) upon which appellants' argument is founded, namely, the clause providing that the Court shall not "interfere with (a) any of the political or governmental powers of the petitioner," appellants insist (Op. Br. p. 23) that any order made by the trial court must "interfere" with the functions of the district. In view of the decision in the *Bekins* case this contention cannot be sustained. The Supreme Court has held the act effective as applied to a California irrigation district. If any relief granted by the Court must "interfere", in the sense intended by the act, with the functions of the district, the *Bekins* decision could not have been rendered.

This is definitely recognized in *Supreme Forest Woodmen Circle v. City of Belton, Texas* (C. C. A. 5), 100 Fed. (2d) 655. The Court says, at page 657, referring to the *Bekins* case:

> ". . . it sustained the act as to the irrigation district on the ground that it was *not an attempt to*

interfere with its governmental functions, but only an extension to taxing districts of the benefits of the relief which, varying in form, but the same in substance, had been extended by other bankruptcy acts to persons, associations, and corporations."

Again the Court says, on page 657, referring to the act:

> "And it concerns itself with the city as a debtor, not compulsorily, nor by way of *interference* with it, but only upon the city's invocation, and as an aid and assistance to it and its creditors."

This Court will realize that it is only upon the application of the district itself that the trial court could grant any relief under the act. The relief granted does not oppose or upset or prevent the carrying out of the functions of the district. Viewed broadly, such relief is a positive aid to the functioning of the district. It was in such a sense that the Supreme Court in the *Bekins* case must have interpreted "interfere", as used in Section 83. Such an interpretation is by no means unusual. Thus in *Conger v. Italian Vineyard Co.,* 186 Cal. 404 at p. 407, it is stated:

> "Considered in its broadest aspect, the term 'interfere' bears the significance of 'disarrange,' 'disturb,' 'hinder'."

The term is defined in 33 *Corpus Juris* 267 as:

> "To interpose; to prevent some action; sometimes in a bad sense, to intermeddle; to check or hamper. In its broadest aspects the term 'interfere' bears the significance of 'disarrange,' 'disturb,' 'hinder'."

"The words 'interfere with or affect any settlement' mean invalidate or render inoperative any settlement."

In re Armstrong, 21 Q. B. D. 264, 270, 57 L. J. Q. B. 557;

In re Onslow, 39 Ch. D. 622, 625.

See, also, *Webster's New International Dictionary,* 2nd Ed., and the *Century Dictionary and Encyclopedia,* Vol. V.

Since the relief sought is in aid of the continued functioning of the district, and, as shown in the case at bar, without such aid the district cannot continue to function and may be forced to terminate its operations, the decision in the *Bekins* case, if it required justification in this respect, is amply justified.

Counsel would have this Court reverse the *Bekins* case because of the decision in *Erie R. R. Co. v. Tompkins,* 304 U. S. 64; 82 L. ed. 1188. The *Bekins* case was argued April 7, 1938, and decided April 25, 1938. A rehearing was denied on May 23, 1938. The *Erie* case was argued January 31, 1938, and decided April 25, 1938, the same day on which the decision in the *Bekins* case was announced. Both, accordingly, were under consideration by the Court at the very same time. The Court denied a rehearing in the *Bekins* case a month after the *Erie* case was decided. Counsel for appellants in the case at bar were the counsel for appellee bondholders in the *Bekins* case, and had full opportunity to present to the Court in the *Bekins* case the theory which they now advance to this Court. It is respectfully submitted that this Court cannot be expected, under the circumstances, to declare that the *Bekins* decision is not law, by reason of counsel's rather involved argument based on the *Erie* case.

Second Proposition: "There Is Another Action Pending in the State Courts of California Upon the Same Identical Cause of Action and Demanding Substantially the Same Relief, and That That Action Was Commenced and Pending Under State Law Prior to the Passing of Chapter X of the Bankruptcy Act Upon Which This Proceeding Was Prosecuted."

This contention was raised in the trial court.

Appellants argue that the pendency of the proceeding commenced by appellee in the Superior Court of Riverside County under the "Irrigation District Refinancing Act" [St. Cal. 1937, Ch. 24; Appendix to Op. Br. p. 1] is a bar to the present proceeding and therefore the District Court had no jurisdiction. This proposition assumes two things: first, that the State Act was constitutional, and, second, that the proceeding provided by the State Act was an insolvency act.

On the first point the hearing in the Superior Court consumed seven days, of which, as the writer recalls it, three solid days were devoted to argument as to the constitutionality of the State act. Present counsel for appellants, representing the same clients, then strenuously and lengthily argued that the State act was unconstitutional. They admit (Op. Br. p. 34) that "These appellants took the position at the time the action was filed in the State Court *and has continued to hold that position* that the state act is unconstitutional, . . ."

They do not now assert that it is constitutional. If it is not, then, of course, the Superior Court had no jurisdiction, and the proceeding was *coram non judice.* This Court can hardly be expected to follow appellants'

present argument unless appellants are willing to commit themselves as to whether the act on which they are now hanging their argument is a valid and existing act.

In the second place, the State act was not in any sense an insolvency act. It provided for a proceeding in two phases: the first phase or hearing being authorized under the police power of the State, the district and its creditors are brought together before a court of equity so that, for the protection of both the district and creditors, the Court might in an orderly way solve the question whether the proposed plan of readjustment was fair, equitable, and for the best interests of the creditors. In this proceeding, however, no injury could be done the non-assenting bondholders. Only those who assented would be bound by the interlocutory decree. *Volenti non fit injuria.*

The second phase or hearing authorized by the Statute was purely and simply a condemnation trial in which a court or jury should determine the fair value of the bonds, a judgment of condemnation should be entered, and the district be authorized to acquire the old bonds by purchase under the judgment and under the power of eminent domain.

The Statute itself [Appendix to Op. Br. p. 4] says:

> "Therefore, to meet this condition of emergency, the *police power* and the power of *eminent domain* are hereby invoked and such irrigation districts herein referred to are hereby authorized to institute and maintain the proceedings and actions as hereinafter set forth . . ."

It is crystal-clear that the legislature did not intend to invoke, nor did it invoke, any supposed power to regulate insolvency proceedings.

Appellee is perfectly willing to concede appellants' argument that if the Act is an insolvency Act it is unconstitutional. The Supreme Court so held in *United States v. Bekins,* 304 U. S. 27, when it said, at pages 53, 54:

> "In the instant case we have cooperation to provide a remedy for a serious condition in which the states alone were unable to afford relief . . . The natural and reasonable remedy, through composition of the debts of the district was *not available under state law* by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation."

On June 18, 1938, appellee moved the Superior Court to set aside its submission of the case, and to dismiss the case. At the same time appellants moved that judgment be entered against the district. Appellee's motions were granted and appellants' motion was denied. Thereafter, appellants sought to keep the State case alive by appealing from the Superior Court's rulings. In view of appellants' general demurrer and motion to strike the petition from the files of the State Court (Op. Br. p. 35), and their insistent contention that the State act was unconstitutional, appellants' appeal from a judgment of the Superior Court by which they were rid of the entire case seems rather insincere. They now want to keep the State proceeding alive, not because any decision rendered by the State Court could be acceptable or advantageous to them, but solely because they believe it might bar the jurisdiction of the Court in this cause.

Counsel cite a number of authorities to the effect that a State proceeding pending under an insolvency act at the time of the passage of the Bankruptcy Act, is not thereby terminated but may proceed to a conclusion.

Granting this, the State act in question was not an insolvency act and if it were, would be unconstitutional and void.

But it is not necessary to grant that State insolvency proceedings are unaffected by the enactment of Chapter X of the Bankruptcy Act. The original Bankruptcy Act of 1898 contained Section 71, which read:

> "Proceedings commenced under State Insolvency laws before the passage of this Act shall not be affected by it."

This section was *stricken out* by amendment in 1903. The manifest intent of Congress in striking out the section was that it should not continue to be the law. And this intent is directly in line with one of the major principles of Federal bankruptcy legislation, namely, that the jurisdiction of the bankruptcy court is, and in the nature of things must be, paramount, supreme and exclusive.

In re Watts, 190 U. S. 1, 27, 35, 47 L. ed. 933, 941, 944;

International Shoe Co. v. Pinkus, 278 U. S. 261, 265, 268, 73 L. ed. 318, 320, 322;

New York v. Irving Trust Co., 288 U. S. 329, 333, 77 L. ed. 815, 818;

Collins v. Welsh (C. C. A. 9), 75 Fed. (2d) 894, 99 A. L. R. 1319;

U. S. Nat. Bank v Pamp (C. C. A. 8), 77 Fed. (2d) 9, 99 A. L. R. 1370;

In re Faour (C. C. A. 2), 72 Fed. (2d) 719.

Third Proposition: "The Cause Is Res Judicata."

This proposition was argued in the trial court.

Appellants here contend that the judgment in the district's first proceeding under Section 80 is *res judicata* and a bar to this proceeding. Appellants proceed through some eight pages of their brief (pp. 43 to 51) to attempt to analyze the decisions in the *Ashton* case and *Bekins* case, and urge that the latter overrules the former. The Supreme Court did not say so. It did say the present statute (Sections 81 to 84) is constitutional. Appellee does not feel constrained to follow appellants' argument in detail, since only the Supreme Court can say whether it intended to overrule the *Ashton* case. This Court cannot possibly ascertain what considerations were in the minds of the nine justices, but were not expressed in their decision in the *Bekins* case.

However, the doctrine of *res judicata* has no application whatever to the kind of decision which was rendered in appellee's proceeding under Section 80. It will be remembered that the trial court in that proceeding, after a full hearing, determined and rendered its opinion that the plan of readjustment was fair, equitable and for the best interests of the creditors, and directed findings and judgment to be prepared. Before the findings and judgment were signed, the Supreme Court rendered its decision in the *Ashton* case, and the District Court thereafter, upon the sole ground of the unconstitutionality of Section 80 (Op. Br. p. 7; Tr. p. 298) dismissed the case.

We are quite in accord with the law as declared by Mr. Justice Harlan in *Southern Pacific R. R. Co. v. U. S.,* 168 U. S. 1, 48, and quoted (Op. Br. p. 51) by appellants, under which application of the doctrine of *res judicata* is

made to depend upon the determination of "a right, question, or fact distinctly put in issue and directly determined by a court. . . ." No right, question or fact was determined by the District Court in appellee's first bankruptcy case, other than the determination that the act was unconstitutional.

It is uniformly held that a dismissal for lack of jurisdiction is not a bar, under the rule of *res judicata.*

> *Waldon v. Bodley,* 14 Pet. 156 at p. 161, 10 L. ed. 398, 400;
>
> *Phelps v. Harris,* 101 U. S. 370 at p. 376, 25 L. ed. 855 at p. 857;
>
> *Smith v. McNeal,* 109 U. S. 426 at p. 429, 27 L. ed. 986, 987;
>
> *Murray v. Pocatello,* 226 U. S. 318 at p. 323, 57 L. ed. 239, 242.

In the last cited case, Mr. Justice Holmes, with characteristic clarity, states in a sentence the reason for the rule as follows:

> "Of course, if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were."

And the general rule of *res judicata* is stated in the leading case of *Hughes v. U. S.,* 71 U. S. 232 at p. 237, 18 L. ed. 303, 305, where the Court holds:

> "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, *and must be determined on its merits.* If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, *or the want*

> *of jurisdiction,* or was disposed of on any ground *which did not go to the merits of the action,* the judgment rendered will prove no bar to another suit."

Appellants would have this Court hold that the District Court's decision in the first bankruptcy case was equal to a decision that appellee, on the merits, was not entitled to the relief it sought. This is just the opposite of what the District Judge, as evidenced by his opinion, intended to decide. It would be ridiculously artificial and unreal to hold that a dismissal on the ground of unconstitutionality forever barred the courts from examining the merits of the cause, after a new and constitutional statute has been enacted.

We reiterate that the one thing determined by the District Court was that Section 80 was *unconstitutional.* If this be *res judicata,* then let it be remembered that the appellants in the cause at bar were parties to that decision *and are bound by it.* They cannot here be heard to urge that Section 80 was constitutional.

There is one more reason why dismissal of the first bankruptcy cause should not be deemed *res judicata.* In enacting Section 83, under which the present proceeding is brought, the Congress specifically provided in Subdivision (h) as follows:

> "(h) This chapter shall not be construed as to modify or repeal any prior, existing statute relating to the refinancing or readjustment of indebtedness of municipalities, political subdivisions, or districts: Provided, however, that the initiation of proceedings or the filing of a petition under Section 80 shall not constitute a bar to the same taxing agency or instrumentality initiating a new proceeding under Section 81 thereof."

It is apparent that the Congress took thought on the fact that many proceedings had been filed under Section 80, which the Court had declared unconstitutional, and that the Congress intended expressly to see to it that the existence of such former proceedings should not bar relief under the new statute. The specific language chosen by the Congress, "initiation of proceedings or the filing of a petition", perhaps was not fortunate, but it is clear beyond words what the Congress meant. There could have been relatively few proceedings under Section 80 in which the sole step taken by the petitioner was to initiate proceedings or file a petition. As the published reports show, there were many such cases in all stages of litigation from the filing of petitions to hearings and decisions before the Circuit Courts of Appeals. No rational ground exists upon which the Congress could be imagined to have discriminated between those proceedings which were tried and submitted for decision,—those proceedings in which the petition only had been filed, or those which were decided by the District Courts and pending in the Circuit Courts of Appeals. The same reason for eliminating the rule of *res judicata* must have existed in the mind of the Congress as to all of these proceedings. *Idem ratio, idem lex,* or, as Section 3511 of the Civil Code of California anglicizes it: "Where the reason is the same, the rule should be the same." The Congress intended by Section 83(h) that those districts which had *prosecuted* proceedings under Section 80 should have the opportunity to apply for relief under Section 83. This Court, it is submitted, will not so apply the doctrine of *res judicata* as to thwart the intent of the Congress.

Fourth Proposition: "Reconstruction Finance Corporation Is Not a Creditor Affected by the Plan."

This proposition was not presented to the trial court.

Appellants here attack the finding of the trial court that R. F. C. owned more than 96% of the indebtedness affected by the plan of composition, and more than 95% of each of the issues mentioned in the petition. To support their attack appellants recite some of the proceedings leading up to the acquisition by R. F. C. of 96.76% of the old bonds. Appellants thus bring to this Court's attention certain of the facts, documentary and otherwise, which were considered by the trial court in rendering its decision. Appellants do not by any means furnish this Court with all the evidence on the subject.

If it were necessary to admit that the evidence before the trial court was conflicting, the attack upon the finding is nevertheless insufficient; if the evidence is conflicting then this Court will not disturb the finding. This rule is so elementary that the citation of authority is rather superfluous. All that is necessary is that there appear in the evidence some substantial support for the finding.

> *Burkhard Investment Co. v. U. S.* (C. C. A. 9), 100 Fed. (2d) 642, 645;
>
> *Wilson v. U. S.* (C. C. A. 9), 100 Fed. (2d) 552, 555.
>
> *Clark etc. Co. v. McAllister* (C. C. A. 9), 101 Fed. (2d) 709, 714;
>
> *Wire Tie Mach. Co. v. Pacific Box Corp.* (C. C. A. 9), 102 Fed. (2d) 543, 552.

Appellee respectfully submits that not only is there substantial evidence that R. F. C. is the owner of the

bonds in question, but that the evidence positively compels that conclusion.

The evidence relating to the transaction between the district and R. F. C. commences with July, 1933, in which month the District made application to R. F. C. for a loan under Section 36 of the Emergency Farm Mortgage Act of 1933. Such a loan was *conditionally* approved by R. F. C. by resolution adopted March 1, 1934.

Appellants are not accurate in stating (Op. Br. p. 58) that (1) "The plan set up in that resolution is the same plan brought forward as a plan of composition . . . in these proceedings", or (2) that "The plan has never been changed or modified". The fact is that the resolution in question is not the only act of the R. F. C. by which its position has been determined. It was not an immutable act. Nor is the plan of the resolution identical with, or very similar to, the plan involved in the present proceeding. It may be said that the resolution furnishes some background and some detailed provisions which may be found in the plan of composition. Beyond this, one may not accurately go.

The resolution appears in the transcript [pp. 201 to 223]. After preliminary recitals, it states [p. 203]:

> "Now, Therefore, Be it Resolved, that there is hereby authorized a loan of not exceeding $1,039,-423.00, to or for the benefit of said District, *subject, however, to the following terms and conditions: . . .*"

Thereupon follow detailed conditions precedent and requirements which cover 19 pages of the printed transcript. It is not necessary to examine more than a few of these conditions. It is provided that the holders of old securities shall deposit them with committees, depositaries

or other responsible representatives satisfactory to them. The resolution continues [Tr. p. 204]:

> "No loan shall be made hereunder (a) unless *all* of the Old Securities shall be thus deposited; or (b) unless the Division Chief shall deem that such a large proportion of such securities has been deposited as will satisfactorily accomplish the purposes of this Corporation in authorizing this loan . . ."

Here it may be stated that the Division Chief has at no time made a determination that deposit of less than all of the securities will be satisfactory.

Paragraph 5 of the Resolution [Tr. pp. 207 to 210] sets up two possible methods of consummating the proposed loan. "Such loans shall be effected in any of the following ways as said Division Chief and Counsel shall direct: (a) If the Division Chief shall deem it advisable to have the deposited securities cancelled immediately upon the issuance of the New Bonds, such loans may be advanced directly to the District *or* to the Owners' Agents and consenting owners at the time of the surrender and cancellation of the Deposited Securities, but only upon receipt by this Corporation of New Bonds having a principal amount equal to the amount of the loans it has made hereunder."

The Division Chief has never made such a determination and no new bonds have been executed. Accordingly this method has not been followed.

The resolution proceeds: "(b) In the event that the Division Chief shall deem it necessary to keep any or all of the Deposited Securities alive for a greater or lesser length of time *in order to maintain a parity of rights as between the holders of the Deposited Securities and the rights of the holders of Old Securities who did*

not deposit same, or for any other purpose, then such loans may be made directly to the Owners' Agents and consenting owners. All such loans shall be represented by *notes* of said consenting owners or Owners' Agents and the Deposited Securities shall be *pledged* as security therefor. . . . *The district shall not be a party to such note* but in case it shall pay the interest thereon promptly when and as the same falls due, the Corporation will accept such interest payments and will thereupon give credit to the district for payment of the interest for such period on all the Deposited Securities at that time held by this Corporation, it being expressly provided, however, that nothing contained in this resolution shall be deemed to limit the right of this Corporation *to enforce full payment of interest or principal on Deposited Securities* it may hold, at any time when it may deem it advisable to do so in order to protect its rights as holder of the Deposited Securities against any rights claimed by the holders of Old Securities that have not been deposited. . . ."

The plan suggested in this provision was not carried out. No loans were made to owners' agents or consenting owners nor did they or the district execute any note or notes.

After the adoption of the resolution, the district and R. F. C. entered into two separate contracts, both of which are dated August 7, 1934. The longer of these two contracts [Exhibit 19, Tr. p. 225] was authorized by the District Board on July 24, 1934. It provides [Tr. p. 227]: "That R. F. C. agrees to loan an amount not to exceed $1,039,423.00 to or for the benefit of the said district *in accordance with, and subject to, the terms and conditions* more fully specified in said resolution of the R. F. C., dated March 1, 1934, . . ."

The condition requiring deposit of all of the old securities has not been complied with. The determination of the Division Chief that deposit of less than all will be satisfactory has never been made. The agreement provides [Tr. p. 229] that R. F. C. *"agrees, subject to full compliance with all the conditions and terms of the resolution of R. F. C. of March 1, 1934"* to take delivery of refunding bonds and provide funds in the amounts authorized by the resolution, "provided that R. F. C. may in the alternative, as provided for in said resolution of March 1, 1934, *make its loan or loans directly to the owners' agents and consenting owners* of the old securities upon receiving the note or notes of such consenting owners or owners' agents . . ."

This, as hereinbefore noted, was not carried out.

The second agreement of August 7, 1934 [Exhibit 20, Tr. p. 236], was approved by the District Board on August 7, 1934. It provides an entirely new method of procedure not expressed in the resolution of March 1, 1934 [Tr. p. 237]:

> "(1) The Corporation may make disbursements at any time it is willing to do so for the purpose of *acquiring* any portion of the Old Securities available for refinancing, . . ."
>
> "(2) Until the Old Securities *acquired* and held by the Corporation by reason of or in connection with such disbursements are exchanged for New Bonds issued by the District, or are otherwise refinanced as provided in said resolution, they shall at all times continue to be and constitute obligations of the District for the full face amount thereof.
>
> "(3) When *all* of the Old Securities are made available for refinancing and are *acquired* by the Corporation the reduction in the district's indebted-

ness will be effected to the extent and in the manner provided in said resolution authorizing said loan, and the parties hereto will do all acts and take all steps and proceedings necessary or appropriate to facilitate and accomplish expeditiously such result. . . ."

. . . .

"(6) During the time the Corporation holds any of said Old Securities and the same have not been refinanced by the issuance and delivery of New Bonds or as otherwise provided in said resolution, the district will annually levy and collect taxes and assessments in sufficient amounts to pay, and will pay, the Corporation each year a sum that will yield to the Corporation four per cent upon the total amount of the disbursements made by it in acquiring such Old Securities, or rights or interests in or to such Old Securities; provided, that the Corporation can during any such time require the District to pay any larger sum, *not exceeding the amount due on said Old Securities according to the terms thereof, in which event the district will so levy, collect and pay such larger sum.*"

It is thus clear beyond peradventure of doubt that by the terms of the documents above outlined, R. F. C. expressly retained the power to enforce to their full face value the principal and interest of all of the old bonds which it should acquire.

The underlying purpose is plain. R. F. C. did not choose partially to refinance the district and leave the non-assenting bondholders' position improved by that fact, to the detriment of both R. F. C. and the district. After the execution of the above contract, its intention was carried into execution by the specific document under which it proceeded to acquire 96.76% of the old securities.

The old securities were on deposit with the Security-First National Bank of Los Angeles in an escrow which had been open for some months. On October 6, 1934, R. F. C. addressed to the Federal Reserve Bank of San Francisco, Los Angeles Branch, a letter [Exhibit No. 5, Tr. pp. 153 to 164] by which it gave the Federal Reserve Bank explicit and voluminous instructions as to what it wanted done. It says:

> "This Corporation has *authorized* a loan of not to exceed the sum of $1,039,423.00, for the purpose of enabling Palo Verde Irrigation District, a public corporation, organized under the laws of the State of California, to reduce and refinance its outstanding bonded indebtedness.
>
> "We *now* wish to *purchase* outstanding bonds of the district (either issued by the district or assumed by it) in an aggregate principal amount of not to exceed $4,174,330.36 on the basis of a payment at the rate of 24.81 cents for each dollar principal amount of the bonds so *purchased* and to also *purchase* a $4,000.00 promissory note executed by Palo Verde Irrigation District and now held by Bank of America at Los Angeles, which note is to be *purchased* at the rate of 25 cents for each dollar of principal due therefor.
>
> "We are forwarding a copy of this letter to L. A. Hauser, President of the district, who will make arrangements for the delivery of the securities to be *purchased*."

The Court has observed that in the foregoing quotation from the instructions the precise and definite word "purchase" is used *five* times. In the remaining portions of the

letter of instructions the same word or its derivatives has been used *ten* times more. Thus the intention of R. F. C., which was furnishing the money, is evidenced in all fifteen times by the use of the same term. The term has a definite legal meaning and, in view of the last agreement between the parties [Exhibit 20] was unmistakably used consciously by R. F. C.

It is respectfully submitted that the transaction which followed, whereby the Security-First National Bank of Los Angeles delivered to the Federal Reserve Bank approximately $4,000,000 face value of old bonds and received in exchange approximately $1,000,000 in money, was and could have been nothing whatever but a *purchase* by R. F. C., whereby R. F. C. acquired title to the bonds. No note of the district or of former owners of the bonds or of any owners' agents was executed. No unconditional obligation on anyone's part existed for which the bonds could have been delivered and pledged as collateral. The only obligation on the part of the district toward the R. F. C. arose under the resolutions adopted by R. F. C. and the District Board respectively and the contracts between them, all of which, as is hereinbefore demonstrated, were conditional and preliminary in their nature.

Appellants urge that the terms of certain of the resolutions adopted by the District Board contradict the Court's finding. It is true that at times the transaction was loosely referred to as a "loan". But it is plain beyond words that the loan referred to was one which was yet to be consummated and has never yet been consummated.

The district, it is true, earnestly and sincerely desires that such a loan shall be consummated. It has waited five years for such a consummation. It hopes that the loan may be made. Nevertheless, the true nature of the situation, both on the part of the R. F. C. and the district, is clearly that of successive steps leading to a result which has not yet been achieved and apparently will not be achieved until all of the old securities are in some manner brought in for refinancing.

Appellants suggest, rather than argue, that it was *ultra vires* for the district to spend its money for the purpose of bringing about a transfer of the old securities from the former holders to the R. F. C. If this were the whole of the transaction, perhaps the district had no such authority But when that act is viewed as a step in the course of dealings by which it was anticipated that all of the district's indebtedness would ultimately be refinanced, the public benefit to the district and the justification for expenditure of its funds are clear enough.

Appellants also challenge the purchase of any bonds by R. F. C. as *ultra vires,* under section 36 of the Emergency Farm Mortgage Act of 1933, as amended. (Title 43, Sec. 403, U. S. C.) The last sentence of this section reads:

> "When application therefore shall have been made by any such district, political subdivision, company, or association any loan authorized by this section may be made either to such district, political subdivision, company, or association or to the holders or representatives of the holders of their existing indebted-

ness, and such loans may be made upon promissory notes collateraled by the obligations of such district, political subdivision, company, or association *or through the purchase of securities issued or to be issued by such district, political subdivision, company, or association.*"

If this were not sufficient authority, it must be remembered that the above mentioned section 36 is not the only statute which grants powers to the R. F. C. It also has general powers, under Title 15, Ch. 14, U. S. C., among which (Sec. 604) it has the power, "to make contracts." This power is granted without limitation or qualification. The purchase of a bond is the making of a contract.

But regardless of any refined examination into the specific powers of R. F. C. or of the district, it must be realized that neither the State nor the United States is here complaining of any *ultra vires* act. The complainants are private persons, with whom R. F. C. has no relations whatever. Under familiar principles appellants have no right to question the authority of either the district or R. F. C. Particularly is this true when, as was held in *Pullman Co. v. Central Transportation Co.*, 139 U. S. 62, 63; 35 L. Ed. 69, where the objection of *ultra vires* is not brought to the attention of the trial court, the objector is not entitled to raise the question for the first time in the Supreme Court.

It will be remembered that under the decisions of both the Supreme Court of the United States and the Supreme Court of California, the objection that an act of a corpo-

ration is *ultra vires,* can only be raised by the sovereignty which gave it existence. Third persons cannot raise the question.

> *Union National Bank v. Matthews,* 98 U. S. 621, 629, 25 L. Ed. 188, 190;
>
> *Reynolds v. First National Bank,* 112 U. S. 405, 413, 28 L. Ed. 733, 736;
>
> *Fortier v. New Orleans Natl. Bank,* 112 U. S. 439, 451, 28 L. Ed. 764, 768.
>
> *Jones v. N. Y. Guaranty Co.,* 101 U. S. 622, 628, 25 L. Ed. 1030, 1035;
>
> *Union Water Co. v. Murphey's Flat Fluming Co.,* 22 Cal. 620, 631;
>
> *McCann v. Children's Home, Inc.,* 176 Cal. 359, 364.

The theory is set up by appellants that the transaction by which R. F. C. disbursed its funds was one by which the money was disbursed to the district and the title to the bonds passed from the bondholders to the district, thence to the R. F. C. It is claimed that R. F. C. holds the bond as collateral to a pledge made by the district. Beside the fact that there are several missing links in the transaction, appellants' theory disregards the real nature of the proceedings.

The district's indebtedness, amounting to over four million dollars, was divided into approximately 7,000 separate bonds held by many hundreds, if not thousands, of individuals. R. F. C. did not attempt to deal directly with these individuals. That would have been utterly impracticable. Some one obviously had to act as intermedi-

ary and bring about the successive steps necessary to consummate the transfer of the bonds to R. F. C. The first steps consisted of the district's suggesting that the bondholders organize a bondholders' committee, which over a period of four years obtained the deposit with the Security-First National Bank of Los Angeles of approximately 87% of the bonds. Next, the district brought this group into a compromise with the group holding Mutual Water Company bonds. Next, the district caused an escrow to be opened with the Security Bank, through which these and other bonds should ultimately be transferred to R. F. C. Some one had to advise the Security Bank when the funds were available for the transfer and put it into communication with the Federal Reserve Bank. Finally, some one had to pay the expenses of the escrow, amounting to $950.00 [Tr. p. 177], not $1,400 or $1,500, as stated by appellants. (Op. Br. p. 73.)

Throughout these proceedings, the district acted as an intermediary, or catalyzer. It was interested, of course, in the successful outcome of the escrow. The bonds were not delivered to it, nor delivered by it to R. F. C. It received none of the proceeds. On the contrary, it bore the relatively nominal expense of the escrow. The dollars received by the Security Bank from R. F. C. were distributed among the former owners of the bonds. [Tr. p. 177.]

On the whole of the evidence the finding of the trial court that R. F. C. is the owner of the bonds it holds and is therefore a creditor affected by the plan is amply supported by substantial evidence and must be sustained.

Fifth Proposition: "The Plan Is One Fully Executed Out of Court, and Not Pursuant to the Statute."

This point is one of the three urged before the trial court.

Here appellants argue that the case at bar is comparable to *In re City of West Palm Beach* (C. C. A. 5), 96 Fed. (2d) 85 (erroneously cited Op. Br. p. 86.)

The dissimilarity between the factual situations in the two cases is, however, distinct and apparent. In the *City of West Palm Beach* case, five-sixths of the old securities had been actually exchanged by the former holders thereof for refunding bonds. The old securities had been surrendered for cancellation and refunding bonds delivered. The holders of the original bonds signed the acceptance of the plan of composition and were necessary to make up the percentage of creditors required by the act. That the fact of their acceptance of the new securities existed, and was the crucial point in the decision, is unmistakable. The Court says at page 86:

> "Whether the plan must have been offered and accepted as a plan of composition rather than as a plan of voluntary adjustment we need not decide, since the plan with its acceptance became incapable of presentation as a composition *because it had been largely executed.* It appears from the petition that more than a majority of the floating debts involved in the plan had been exchanged for new funding bonds and about five-sixths of the amount of the old bonds had been exchanged for new bonds. The owners of these were no longer acceptors of an executory plan, but had been fully settled with under it and no longer had any direct interest in it. They could not fairly be counted as voters before the court on the propriety of the plan."

The opinion concludes:

> "As the case was made by the petition there was no plan accepted by fifty-one per cent of the securities to be affected, but a plan the acceptors of which had converted themselves into holders of other securities which are not to be affected. The petition was properly dismissed."

It may be that under the statute, as existing at the time of the *West Palm Beach* decision, the Court was correct or incorrect, in holding that when creditors had exchanged their old securities for new ones they ceased to be the owners of the old securities and lost the right to consent to the composition proceeding. It is unnecessary to decide this question now.

The Congress has reversed the *West Palm Beach* case by adding to Section 83 new subsection (j), which reads:

> "(j) The partial completion or execution of any plan of composition as outlined in any petition filed under the terms of this title by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this title, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition."

That amendment is part of the Chandler Act, approved June 22, 1938, and effective September 22, 1938. It de-

clares that where actual exchange of securities has taken place under and in accordance with the plan, the holders of the old securities shall nevertheless be included as acceptors of the plan. This being the law, it is *a fortiori* clear (as it would have been in spite of the *West Palm Beach* case) that where no exchange of securities has occurred, the old securities are still outstanding, and the refunding bonds have never been issued, which is the case at bar, there is nothing to prevent the holders of the old securities from accepting the plan.

In the case at bar, R. F. C. has purchased, owns and holds more than 95% of each of the issues of bonds involved. It has not exchanged its old bonds for new ones. It has intentionally declined to do so, as evidenced by the provisions of the resolution of March 1, 1934, and the two contracts of August 7, 1934. (Exhibits 19 and 20.) The Court will recall the provisions of these instruments which indicate the purpose of R. F. C. to retain the old securities so long as necessary to maintain parity between its rights and the rights of non-accepting bondholders.

The Congress has specifically defined the position of R. F. C. as a creditor in Section 82 of the Act, which reads in part:

> "Sec. 82. The following terms as used in this chapter, unless a different meaning is plainly required by the context, shall be construed as follows: . . .
>
> "The term 'creditor' means the holder of a security or securities.

> "Any agency of the United States holding securities acquired pursuant to contract with any petitioner under this chapter shall be deemed a creditor in the amount of the full face value thereof. * * *"

R. F. C. is an agency of the United States and holds securities which it acquired pursuant to contract with appellee.

Appellants claim that the plan was fully effected as to R. F. C. when the first bankruptcy petition under Section 80 was filed. It is true that R. F. C. accepted the first plan. That plan was necessarily and obviously *conditional* in its nature.

Section 80 (e) expressly provided in part:

> "Before a plan is confirmed, changes and modifications may be made therein, with the approval of the judge after hearing upon notice to creditors, *subject to the right of any creditor who shall previously have accepted the plan to withdraw his acceptance,* within a period to be fixed by the judge and after such notice as the judge may direct, if, in the opinion of the judge, the change or modification will be materially adverse to the interest of such creditor, and if any creditor having such right of withdrawal shall not withdraw within such period, he shall be deemed to have accepted the plan as changed or modified: Provided, however, that the plan as changed or modified shall comply with all the provisions of this subdivision."

It is plain that the proceeding under Section 80 never reached the point of entry of a decree approving the plan. The proceeding was terminated without such approval and the plan and its conditional acceptance by R. F. C. were dead.

The same principles apply to the acceptance by R. F. C. of the plan in the state court proceeding under the Irrigation District Refinancing Act. Section 9 of that Act provides in part:

> "All changes, amendments or modifications shall be subject to the right of any creditor who shall previously have accepted the plan to withdraw his acceptance within a period to be fixed by the court and after such notice as the court may direct, if in the opinion of the court, the amendment, change or modification will be materially adverse to the interest of such creditor."

Thus the acceptance of the plan in the trial court was *conditional* upon the plan being approved by the Court unchanged. As in the proceeding under section 80, this point was never reached.

Counsel urge a strained interpretation of Section 19 of the State Act, which reads in part:

> "Sec. 19. Consent of Accepting Bond or Warrant Holders Not Affected by Invalidity of Any Portion of This Act or Dismissal of Petition. In the event that said petition for liquidation, refinancing or readjustment is dismissed, or that any of the provisions hereof for confirmation of the plan

> or acquisition of the bonds or warrants of the non-accepting holders shall be declared invalid, such dismissal or declaraion shall not affect the effectiveness of the plan with respect to the district or holders of bonds or warrants accepting the same."

Appellants urge that the words "dismissed" and "dismissal" apply to the voluntary dismissal made on motion of the petitioner and that the R. F. C. is therefore still bound by the plan. That this is not the true interpretation of the section appears from two considerations. In Section 19, the fact of dismissal is carried as a correlative to the fact of partial invalidity of the Act. Either of these facts would result in a judicial *prevention* of the district from having the full relief accorded by the Act. Also, a careful reading of the entire Act shows that the only kind of dismissal mentioned in the Act is that referred to in Section 8, in which, after setting forth the findings which the Court must make in order to enter an interlocutory judgment confirming the plan, it is stated:

> "If not so satisfied as above provided, the court shall enter a judgment dismissing the proceeding."

This kind of dismissal, that is, an *involuntary* dismissal based on the insufficiency of petitioner's proof, is what is intended and referred to in Section 19. And there is nothing in Section 19 which inhibits the district and the majority of its creditors from abandoning the plan in question and agreeing upon a new and different plan. Such new agreement is what actually took place in the present

case. At least one provision of the former plan was substantially *altered* when the plan of composition involved in the case at bar was drafted. The plan under Section 80 [Tr. pp. 332, 333] provided only for the offer of refunding bonds of the district at 24.81 cents per dollar in exchange for old securities. The plan under the State Act was identical in this respect. The plan of composition in the present case, however [Tr. pp. 120, 121], offers in exchange for the old bonds "*cash*, or, at the district's option, the bonds of this district of the 'Third Issue of Bonds (Refunding)' " at 24.81 cents per dollar.

The Court can readily see that an offer of *cash* instead of 4% bonds might be much different and more acceptable to certain bondholders than an offer of refunding bonds alone. The present plan of composition is therefore, in an important feature, a new and different plan.

Before closing the argument on this proposition we cannot refrain from expressing our surprise at the insult offered to this Court at page 88 of appellant's opening brief, which reads:

> "This question of the position of the R. F. C. is one of the most important in this appeal.
>
> "If ordinary rules of judicial interpretation are to be applied there can be no question of the outcome.
>
> "If the *result* of such interpretation is first to be scrutinized, to ascertain whether thereby Chapter IX and the general pogrom against the public creditor class is to be fully carried out, the appellants are perhaps lost anyway." (Emphasis appellants'.)

Comment is unnecessary.

Sixth Proposition: "The Claims Are Not All of the Same Class."

This proposition was not argued in the trial court.

The appellants state, without serious argument, five items which they consider invalidate the Court's finding that all of the securities are of one class. We comment with like brevity on each. We first ask, however, that the Court note, as illuminating this entire proposition, the provision of Section 83 (b):

> "That the holders of all claims, regardless of the manner in which they are evidenced, which are payable without preference out of funds derived from the same source or sources shall be of one class."

(1) Appellants assert that since R. F. C. is not the owner of the bonds it holds, it is in a separate class. As hereinbefore shown, the trial court held, upon substantial evidence, that R. F. C. is the owner of its bonds and this finding has not been successfully assailed.

(2) Appellants assert that some of them hold judgments against the district and others. As will be more fully shown under the Tenth Proposition herein, none of the appellants hold final judgments. If they did, they would not be in a separate class from other creditors.

> *Valette v. City of Vero Beach* (C. C. A. 5), 104 Fed. (2d) 59, decided May 22, 1939.

(3) Appellants assert that the "holders" of the alternative writ of mandate are in a separate class. This will also be discussed more fully under the Tenth Proposition. The contrary was held in *Valette v. City of Vero Beach, supra.*

(4) It is asserted that each bond and coupon "may be" in a separate class, which is practically the height of the ridiculous. A distinction is also sought to be made that

the holders of matured bonds and coupons are in a different class "because they are primarily the beneficiaries of the trust funds and properties." Yet if there is in the Palo Verde Irrigation District Act any trust in the sense referred to, that trust is for *all* the purposes of the Act and for the payment of *all* the indebtedness, not merely that which has been matured.

It is asserted that R. F. C. does not claim any matured coupons, or claim to have presented any matured bonds. We are satisfied, without making a precise calculation, that the bonds scheduled in the claim of R. F. C. [Tr. p. 48] include fully as large a proportion of matured bonds as the claims of appellants.

(5) Appellants claim that because the Drainage Act provides that the drainage bonds are a prior lien to any subsequent issue, these bonds are prior to some other subsequent bonds. The provision of the Drainage Act referred to [Sec. 30, Appendix to Op. Br. p. 23] clearly means that an issue of drainage bonds has a "preferred lien" to the lien of any subsequent issue of *drainage bonds.* There was only one issue of drainage bonds.

If this point had been urged before the trial court the Court might, upon appellants' theory, have set apart the issue of drainage bonds as a separate class. However, appellants do not intimate how such classification, or the lack of it, is of any import. R. F. C. holds [Tr. p. 35] 98.29% of the entire drainage bond issue, and consented to the proceedings on behalf thereof. How appellants could be injured by the failure of the Court to classify drainage bonds as a separate class is mysterious.

It is therefore respectfully submitted that the finding that all of the indebtedness is of one class has not been successfully assailed.

Seventh Proposition: "The Plan of Composition Is Not Fair, Equitable, or for the Best Interests of Creditors, and It Is Discriminatory."

This proposition was not in any of its phases urged before the trial court.

As in the case of the Sixth Proposition, appellants now urge, without serious argument, sixteen points to which appellee answers as succinctly as possible.

(1) Appellants assert that the "value of the land within the Palo Verde District warrants a vastly more generous payment to the bondholders." They mention the assessed values of the land in 1927 and 1937, and a value placed on the land by the appraiser for the R. F. C. at $70 to $80 per acre. This begs the question. The essential question in this cause is not the value of the land in the district but *the ability of the land to pay.*

The bondholders had their opportunity under the lease and option of August 18, 1932, to take all the land. Under that agreement they had the burden of reselling the land and recolonizing it so that it would produce an income and have a value. They had the burden of seeing to it that the irrigation system was kept in operation, for without the irrigation system the land was worthless desert. It is not surprising that the bondholders chose to give up this lease, and take the cash and let the credit go.

When Mr. Walter D. Wagner, appraiser for the R. F. C., spoke of a land value of $70 to $80 per acre, he spoke of *clear* and *improved* land. He immediately thereafter testified [Tr. p. 295]:

> "The land in 1933 had no sale value whatever. The average cost of clearing brush, leveling the land for irrigation, ditching it, and putting it in a condition to

be farmed would run anywhere from $20 to $50 an acre, possibly some of it higher."

Witness C. B. Reynolds testified [Tr. p. 309]:

> "Very little land has been cleared and leveled in the valley for less than $50 an acre and the average is closer, where it is well leveled, to $100 an acre."

In addition, the land was not clear. It was subject to a debt of over four million dollars, or about $100 per acre on the 30,000 odd acres which had been improved.

(2) Appellants argue that "No provision is made for future prosperity of the district." This is positively untrue. The Court's finding was made in part on the evidence of two eminently qualified expert witnesses. Prof. R. L. Adams, of the University of California, an agricultural economist of many years' experience, first visited Palo Verde Valley in 1908 or 1909, made an economic study thereof in 1931, again in 1933, and again in 1935. His opinion as to the amount of debt which the district could sustain was based upon a carefully prepared estimate as to the income and outgo of farmers in the district over a period of twenty to thirty years in the *future*, taking into account the experience of the past.

Likewise, Mr. Walter D. Wagner, appraiser for the R. F. C., a man generally familiar with all of the irrigation districts in California, and who has made actual appraisals of 75 irrigation districts in California, Arizona, Nevada, Oregon, Washington and Idaho, and investigations of 30 to 40 additional districts; who has repeatedly visited the appellee district and who made the appraisement upon which R. F. C. acted in disbursing its million dollars, testified, on the basis of past crop production and prices, as to

the ability of the land to pay over a 30-year period in the *future*. Further, five farmer-witnesses, basing their testimony on actual experience in farming in the district for from 15 to 30 years, testified as to the maximum costs which the farmers could in the future bear.

(3) Appellants urge that the State, as owner of 99.66% of the land, will be unjustly enriched by the decree. The absurdity of this point is apparent when it is recalled that over half of the land in the district has been resold to former owners and others at nominal prices [which were the most that could be obtained, Tr. p. 309], and that the district holds the tax titles as well as the State. It will also be recalled that the Board of Supervisors of the County of Riverside, in assenting to the district's rehabilitation plans and selling the State tax title to the district for one-half of 1% of the assessed valuation, in effect cancelled approximately three-quarters of a million dollars of its delinquent taxes on the valley, for a consideration of about $10,000.00. [Tr. p. 290.]

(4) It is urged that "It is unfair, if not unconstitutional, to take the property of the bondholder who is a creditor of a public corporation, so to speak, and give it to enrich the landowner who is a stockholder of the corporation, so to speak." This is pure rhetoric, which has no recognizable relation to the facts. The landowners have not been enriched. The land has been taken away from them by tax deed. Some of them have repurchased their land and have started to pay for it again. They are starting over from the grass roots. It must not be forgotten that in reality *the bondholders lost their money when the floods and other economic disasters befell the valley.* At the time the plan of refinancing through R. F. C. was

announced, their bonds were worth 2¢ on the dollar; they had lost the 98¢. The willingness of R. F. C. and the energetic efforts of the district to refinance have made appellants' bonds worth 24.81 cents per dollar. The Court, by its decree, has *not* taken anything from the appellants which they had not theretofore in reality lost.

(5) Appellants, re-stating their second point above, urge that the bondholders should not be restricted to what R. F. C. "is willing to loan during a panic". As has been plainly shown, not only the decision of R. F. C. but the evidence of the witnesses in the case at bar, was based upon a prospective view of the earning power and ability to pay of the farmers of the district. As clearly stated by witness Wagner [Tr. p. 288], "He did not take as the ability of the land to pay what he (it) had been able to pay the last few years, for if he had done so there would have been absolutely no loan value, because the farmers had not made sufficient money even to pay the ordinary operating expenses of the district, let alone anything for bond service. Appraisal was made on the basis of assumed normal prices for crops, and the witness stated that it was assumed in making the loan and the appraisal that prices would get better and farmers would be able to sell their crops at a profit."

(6) Appellants cite Cal. Stats. 1917, page 243, as making it unlawful for the district to issue refunding bonds which would exceed 60% of the value of the bare land, plus the works of the district. A careful examination of the Statute in question discloses no such provision.

(7) Appellants criticise the 33 year period of the proposed R. F. C. loan, saying that the bonds could and should have been issued for 50 years. Sec. 57 of the Palo Verde Irrigation District Act says in part: ". . . no refunding bonds shall have a later date of maturity than forty years from the date of their issuance." Witness Wagner, speaking of the 33 year period generally adopted by R. F. C. stated [Tr. p. 289]: "This is a reasonable period to adopt in refinancing an agricultural district such as this." It is believed to be sound financing not to burden more than one generation with the cost of public works.

(8) It is argued that R. F. C. has received 4% interest, "but these respondents (appellants) are denied the same consideration."

Appellants could have cashed their bonds on October 31, 1934, or on any day since that date. They have voluntarily denied themselves income on the value of their bonds from that date on, for the obvious purpose of trying to mulct the district of a greater sum than 96.76% of the bondholders have accepted. It should be recalled that in three successive trials, the judges have concluded that this amount represented the maximum ability of the district to pay and was fair, equitable and for the best interest of the creditors. Appellants seek by this litigation to grasp more than is fair and equitable. In so doing they have let the interest slip through their fingers. A court of equity will hardly sympathize with them.

(9) Appellants now complain that R. F. C. will receive 4% bonds, but appellants must take cash. The Court

may judge of the sincerity of this claim of discrimination, when appellants throughout the first two proceedings persistently refused to accept 4% bonds.

(10) It is argued that R. F. C. will receive 100 cents on the dollar it loaned, whereas appellants take 24.81 cents. This claim is confused. R. F. C. purchased the bonds it holds at an average price of 24.81 cents per dollar. What appellants *paid* when they bought their bonds, the record does not disclose. None of the appellants has ever submitted himself as a witness in any of the three proceedings, and it has been impossible for the district to cross-examine them on this subject. If the point has any equitable bearing on the case, while it may possibly be that some of the appellants were original investors who paid par for their bonds, appellee does not accept appellants' implication that this is generally true. Appellee is prepared, if occasion arises, to offer evidence that a substantial number of appellants' bonds was purchased by them during the period while the market value of the bonds was dropping from 12 to 2. However this may be, the fact that R. F. C. receives bonds for the exact amount it invested, without profit, has no particular significance.

The plan *might* have been based on what each bondholder paid for his bonds, instead of on face value. If it had been, Exhibit 4 [Appendix hereto, p. 1] shows that nearly $400,000.00 of the bonds were sold at less than 15.

(11) Appellants cite the fact that the holders of the Mutual Water Company bonds received 50 cents per dol-

lar. As the record shows, this came about through an agreement between the Mutual Water Company bondholders and the holders of over 90% of the district bonds [Tr. p. 223], by which the latter consented to a deduction from their money, so that they actually received a net of 23.248¢ per dollar. Appellants are not concerned. The plan does not ask them to contribute, but allows them the full 24.81 cents.

Beyond this, it must be recognized that the Mutual Water Company bondholders had a remedy which the District bondholders did not have. They had the power to foreclose their deed of trust on the irrigation system, buy it in, go into the water business and make what salvage they could. The district bondholders could not do this. Their sole legal remedy was to insist that writs of mandamus to levy taxes be granted. This remedy, under the circumstances, was futile.

(12) It is urged that $100,000 in cash is held by the district as a trust fund earmarked by an alternative writ of mandate and belongs to appellants.

The alternative writ of mandate in question [Tr. pp. 304 to 306] earmarks nothing. No specific funds are referred to in it. No proof has ever been made that $100,000, or any other definite sum is in the hands of the district and subject to this writ.

In *Valette v. City of Vero Beach* (C. C. A. 5), 104 Fed. (2d) 59, certain of the creditors had obtained judg-

ments on their bonds and *mandamus absolute* for the levy of taxes to pay them. The Court holds at page 63:

> "There is no statute giving any lien or preference because of a grant of a mandamus. On its face the mandamus is a mere court order to an officer to do his duty."

Under this point appellants say that trust properties, being all the assets of the district, are taken from appellants. Appellants never had these properties and they are not taken from them. The properties are held in trust, under recent decisions of the Supreme Court of California (*Provident Land Corp. v. Zumwalt,* 96 Cal. Dec. 497; *Clough v. Compton-Delevan Irr. Dist.,* 96 Cal. Dec. 509), "for all the purposes of the Act," not merely for the purpose of paying the bondholders or a particular 1.88% of the bondholders. The Court in the *Provident* case says, for example, at page 503:

> "We do not mean to hold, nor is it contended by plaintiff, that the entire proceeds are held in trust for bondholders. Payment of the bonds is but one of the purposes of the trust."

It is further noteworthy that in the *Provident* case, the Court recognized that the continued operation and maintenance of the district was the primary purpose of the trust and that funds necessary for that purpose could be so used, the "surplus, over and above operating expenses," going to the bondholders.

The final observation on this point made by appellants is that no trustee can take trust property into bankruptcy.

Whether this is true as to ordinary bankruptcy proceedings, is of no import. The Congress has expressly provided, and the Supreme Court has held it constitutional, that such a district as appellee, trustee or not, may have relief under Sec. 83.

(13) Appellants here refer to the liability of the County of Riverside, the Drainage District and the Levee District, which they more fully argue under the Eleventh Proposition, and which will be discussed in our reply to that proposition.

(14) Appellants complain that it is unfair to scale down their claims when other bond issues of the County and the City of Blythe are not similarly scaled down. As above shown, the County has scaled down its delinquent taxes held against the district from $725,000 to $10,000. [Tr. p. 290.] To that extent the district has been relieved of contributing to the County bond issues. If County bonds have been paid 100%, it has been with tax money derived from other sections of the County than the Palo Verde Valley. The City of Blythe bonds were scaled down to less than 50 cents per dollar. [Tr. p. 193.]

Appellee is not given authority by Secs. 81 to 84 of the Bankruptcy Act to initiate a proceeding for the composition of bonds of the County and the City of Blythe. It is given authority to file a petition in respect of the bonds which it has issued and assumed and no others. Appellants' contention would nullify Secs. 81 to 84 in any district where there are overlapping bond issues of various public entities, unless all of the entities, at the same time,

obtained relief under the statute in the same degree. This cannot be the meaning of the act; it does not so require.

(15) Appellants complain that the district retains its water rights and irrigation system, and that the plan does not contemplate taking into account the value of these properties.

This Court will realize that an irrigation system, no matter what it costs, has no value separate from the value of the lands irrigated. It has no ability to produce income other than that of the land to be irrigated. In the arid west, land for which water is available has one value, dry land another. It is thus clear that when the witnesses evaluated the ability of the land to pay and considered it as irrigated land, they took into account the existence of the irrigation system and water rights.

(16) Finally, the contention is made that the right of levee bondholders to assessment against personal property as well as real property was not considered.

Appellants do not show, nor does the record, that the assessed value of personal property in the district is of more than nominal importance. If appellants had considered it as significant they could have offered evidence on the subject. The situation is identical with one point in *Valette v. City of Vero Beach, supra,* in which the Court held at page 62:

> "We think the objectors should have offered the evidence if they considered it important. They suggested the issue. The judge did not refuse to hear evidence; they omitted to offer it."

Eighth Proposition: "The Plan of Composition Is Not Presented in Good Faith."

This proposition was not urged in the trial court.

Appellants present, again without substantial argument, six points in which they urge that the finding of the trial court that the plan was presented in good faith is erroneous. The trial court's finding on this subject must be sustained if it was supported by any substantial evidence. The transcript shows abundantly the history of the efforts on the part of the district and the farmers to ascertain what their ability to pay amounted to, and to get advice and help as to what measures might be adopted to bring order out of chaos, and permit the community to survive. They went to the most authoritative official sources which could be found—the State University, State Engineer, Commissioner of the Bureau of Reclamation, the Secretary of the Interior, Committees of Congress, and finally, to a great and responsible governmental agency, the Reconstruction Finance Corporation. Each of these authorities recognized and found the absolute necessity of readjustment of the indebtedness of the district, if it were not be be forced to suspend operations and to permit the lands of the district to revert to desert. In the face of these findings, as well as the opinions of the trial judges in the three refinancing proceedings, appellants show some hardihood in asserting that the plan is not presented in good faith.

True it is that the dealings of the district and its officials with the bondholders must be fair and honest. True it is that it is the duty of the trial court to investigate the circumstances with care, in order to do even-handed justice between the district and the bondholders.

Absolutely untrue is it, as appellants boldly charge, that there was in fact no careful investigation by the district judge.

It is true that appellants were given no funds with which to make an investigation. The holders of over 87% of the bonds had made their own investigation, at their own expense, with their own engineer. [Tr. p. 195.] Appellants never at any time asked the Court for an allowance of funds for another such investigation for the protection of their 1.88%.

It is not true that there was no one to defend or protect their interests. Counsel in the case at bar, who were counsel in the State refinancing case and in the first proceeding in bankruptcy, who were counsel for bondholders in *U. S. v. Bekins,* 304 U. S. 27, and who appear as counsel for bondholders in a dozen or more irrigation district composition cases, appeared to defend and protect the interests of appellants.

Appellants say that the hearing in the trial court lasted approximately an hour and consisted of a deposit in court of the transcript of the hearing in the State Court.

In view of the fact that the merits of the plan had been the subject of two previous thorough trials, one in the bankruptcy case, and the other in the State Court, which cases present counsel for both sides tried, it was stipulated, to save another week's trial of the same evidence [Tr. p. 46], that the transcript in the State Court might be offered in the present case and "received in evidence with the same effect as if such witnesses had testified in said District Court as their testimony appears in said transcript . . ." It was further stipulated that *no material change* in the conditions relating to the merits of the plan

had occurred since the hearing in the State Court. But this was not all. It was further stipulated that the merits of the plan should be submitted for decision

> "upon said transcript of oral evidence and stipulations, such *additional evidence* as the parties may desire to adduce, such objections, exceptions *and contentions* as the parties may desire to present and upon this stipulation."

It cannot be gainsaid, thus, that appellants had a full and free opportunity to introduce before the District Court any evidence that they chose and to make any contentions that they chose.

The case being an adversary proceeding, what kind of investigation by the Court appellants now demand is difficult to understand. The Court was hardly under any duty to look for evidence which learned and thoroughly experienced counsel did not choose to present.

> *Valette v. City of Vero Beach* (C. C. A. 5), 104 Fed. (2d) 59, 62.

Coming now to the specific points urged by appellants:

(1) They urge that the district presented the facts in a "bitterly partisan spirit showing the utmost hostility to the objectors."

Appellee challenges this statement. There is not a bit of evidence in the record that supports it.

(2) Appellants cite "A long list of harassments of these appellants, . . ." consisting of the proceedings in the three refinancing cases. The shoe is on the other foot. The district has, perforce, not willingly, prosecuted three proceedings, the first of which was commenced March 29,

1935. The bondholders have harassed the district with fourteen suits on bonds or for mandamus. [Tr. pp. 105 to 108.] The court records show that the first group of these cases was commenced June 20, 1934.

(3) Appellants call the execution of Exhibit 20 "connivance" with R. F. C. This agreement was approved by official acts for a lawful purpose. The acts were not only those of the district trustees, as public officers, but of an important and responsible agency of the United States. There was nothing wrong or immoral about the agreement. It meant that R. F. C. was willing to relieve the district, but not in such a way or at such a time as to give an opening for bond speculators to buy bonds of the district at 2 and collect them at 100, plus five years' accrued interest. R. F. C. was not refinancing bondholders for more than their bonds were worth. That the agreement is not palatable to appellants in no way excuses their charge that it was not made in good faith.

(4) As a shotgun charge appellants cite the failure of the county and district officers to meet appellants' obligations according to law. If this refers to their failure to levy taxes, the history of the delinquencies and tax-deeding experience of the district shows conclusively that the levying of more taxes than were levied would not have benefited the appellants. All the land was tax-deeded anyway. The taxes were only a lien on the land and not a personal obligation. If the district had levied ten times as much in taxes the result would have been unchanged.

(5) Appellants charge the district with assisting R. F. C. to acquire the bonds to "buy its way into Court." R. F. C. did not purchase its bonds as a part of a speculation, by which to make a profit through these composition pro-

ceedings. The bulk of the bonds was purchased by R. F. C. October 31, 1934. Secs. 81 to 84 were not enacted until August 16, 1937. The purchase of the bonds was made in no sense for the purpose of speculating upon the misfortunes of the district or non-assenting bondholders, but as a step in a process which the district still hopes will ultimately be completed and which is in the ordinary course of the business of the R. F. C.

(6) Appellants complain at the furnishing of money by the district to pay the expenses of the Security Bank escrow. $950.00 (not $1,450) was so paid. This amount was less than 1/10th of 1% of the amount which was disbursed by R. F. C. in purchasing the old securities. It was not a contribution to the purchase price. How the payment resulted unfairly to appellants, or indicates bad faith on the part of the district is not made clear. Appellants claim that the payment was *ultra vires,* which, of course, under authorities heretofore cited, only the State can assert. But the district has in addition to its specific powers very broad general powers. For example:

> "Sec. 9—Powers and Duties of the District. The District shall have power:
>
> * * * * * * * *
>
> (5) To do and perform all other things necessary, incident or proper to carry into effect the purposes for which this district is created, and as provided by this act."

The charges of bad faith presented by appellants are thus seen to be weak and inconclusive, in the extreme.

Ninth Proposition: "The State as a Debtor Cannot Repudiate Its Obligations in These Proceedings."

This point was not among those urged in the trial court.

Appellants on this point contend that "the State is now in actual fact the owner" of 99.66% of the land in the district. This thought is expressed in some rather hyperbolic language in *El Camino Irr. Dist. v. El Camino Land Corp.,* 96 Cal. Dec. 505, 508. The language is used *arguendo.* It is not accurate to push the theory that the district is an agency of the State to the extremity that the agent and principal are the same. An irrigation district does not have all the powers and immunities of the State nor is it subject to all the limitations and obligations of the State. In *People v. Jefferds,* 126 Cal. 296, the Court holds, at page 301:

> "It is urged that Brown's Valley Irrigation District is a quasi public corporation, and, representing as it does the interests of the people of the state, that laches cannot be imputed to the corporation. * * * It is a rule that statutes are construed as not including the sovereign except the construction is compelled by express terms or by necessary implication; as, for example, statutes of limitations; but it was held in *Estate of Royer,* 123 Cal. 614, that the University of California, though a public corporation and a state instrumentality, is not clothed with the sovereignty of the state, but is included in the statute (Civ. Code, sec. 1313), which limits the amount of any bequest in its nature charitable. *We*

do not think an irrigation district, formed under the statutes of the state, is clothed with the sovereignty of the state or is the sovereign."

Appellants assert (Op. Br. p. 100) that the State is "seeking by these proceedings *to destroy* a public trust . . ." This is not so. The district, rather than the State, is seeking by these proceedings to perpetuate the trust. It is evident that unless the refinancing can be completed the main purpose of the trust, which is the providing of homes and farms, and the continued cultivation of the irrigable lands of the district, cannot continue to be carried out.

The contention that the State is seeking to submit its obligations to the jurisdiction of the Bankruptcy Court is farfetched. The decision in *U. S. v. Bekins,* 304 U. S. 27, expressly rules that the district, although an agency of the State, may have the benefits of Secs. 81 to 84 of the Bankruptcy Act. Present counsel for appellants did in their briefs and arguments in the *Bekins* case urge this same contention upon the Supreme Court and it was not accepted.

Tenth Proposition: "The Decree Unlawfully Takes Trust Funds and Vested Rights Belonging to Respondents." (Appellants)

This point was not argued in the trial court.

It may be first observed that there is no sanctity in "vested rights" in a court of bankruptcy. That court terminates "vested rights" in every case that comes before it.

Appellants argue *in extenso* under this proposition three points:

(1) It is true that appellants Jordan and First National Bank of Tustin each had in the Superior Court certain judgments against the Drainage District and Levee District. Appeals were taken from each of these judgments and are undetermined. Thus, none of these judgments are final or enforcible. Until they are final they bind nobody and establish no vested rights, additional to the rights of these bondholders as general creditors.

In the decision in *Valette v. City of Vero Beach* (C. C. A. 5), 104 Fed. (2d) 59, which was decided May 22, 1939, it appeared that three of the creditors had, before the filing of the petition under Sec. 83, obtained final judgments on their bonds. They contended that they were in a separate class. The trial court found that all the debts were "payable without preference out of funds derived from the same source, to-wit: *ad valorem* taxes, and no specific property or revenue is pledged to the payment of said bonds or any of them." This is substantially

the language used in the second paragraph of Sec. 83 (b). The trial court held accordingly that all the bonds, regardless of judgments, were in one class. The Circuit Court of Appeals affirmed the decision, holding (at p. 62) that the term "pledge" as used in Sec. 83 (b) "refers to a contractual arrangement, rather than to some advantage or lien obtained through legal proceedings."

The Court found that under Florida law a judgment against a municipality gives the creditor no specific lien.

Appellants also say that their judgments, which are inchoate and not final, "are judgments against *other debtors* than the bankrupt." (Emphasis appellants'.)

The "other debtors", meaning the old Drainage and Levee Districts, are defunct. They have been merged into the person of the irrigation district, and have now no existence separate from it. This is, of course, one of the grounds of the appeals from the Superior Court judgments, as was also the fact that the summonses in these cases were served upon one who never was an officer or employee of either the Drainage District or the Levee District.

(2) Appellants next contend that they had vested rights in the writ of mandate obtained from the Superior Court "earmarking certain funds as trust properties belonging to them."

This Court will note that no right of appellants whatever has been *determined* by the Superior Court in the mandate case referred to. The only writ involved was an alternative writ, which was a preliminary process by

which the Court obtained jurisdiction over the district, but which by its terms decided nothing. And if there had been a determination and a peremptory writ of mandate had been issued, the decision of the Fifth Circuit Court of Appeals in the *City of Vero Beach* case, *supra,* at page 63 of the opinion aptly applies:

> "There is no statute giving any lien or preference because of a grant of a mandamus. On its face the mandamus is a mere court order to an officer to do his duty."

(3) Appellants argue that the bondholders are entitled to payment in the order of the presentation of their bonds for payment and that all of the funds of the district are trust property belonging, first to the holders of matured bonds, and second to the holders of unmatured bonds. Counsel cite decisions which do not support their theory.

Clough v. Compton-Delevan Irrigation District, 96 Cal. Dec. 509, at page 511, expressly states that the trust in question "is for all the purposes of the act. Payment of the bondholders is such a purpose, * * *" So much of the *Clough* decision is quoted by appellants (Op. Br. p. 107). As the Court will see, appellants quote but part of the second sentence; the entire sentence reads:

> "Payment of the bondholders is such a purpose, as we have held in the Provident Land Corporation case, supra; but there are other purposes as well, and the bondholders cannot be *considered exclusive beneficiaries, even if the doubtful assumption be made that they, as individuals, are beneficiaries at all.*"

The Court continues:

> "Indeed, it is futile to attempt to discover the 'beneficiaries' of the statutory trust created by Section 29."

In *Provident Land Corporation v. Zumwalt*, 96 Cal. Dec. 497, at page 503, the Court holds:

> "We do not mean to hold, nor is it contended by plaintiff, that the entire proceeds are held in trust for bondholders. Payment of the bonds is but one of the purposes of the trust."

It may be noted that present counsel for both sides herein appeared *amicus curiae* in the *Clough* case.

There is no provision of the Palo Verde Irrigation District Act which gives the holder of a bond which has been presented for payment any preference or priority over any other bondholder. There is such a provision in Sec. 52 of the California Irrigation District Act, which authorizes registration of unpaid matured bonds. Such registration has been held to entitle the holder of the bonds to payment in the order of presentation.

> *Bates v. McHenry,* 123 Cal. App. 81;
> *Selby v. Oakdale Irr. Dist.,* 140 Cal. App. 171;
> *Shouse v. Quinley,* 3 Cal. (2d) 357.

These decisions, of course, do not apply to the Palo Verde District.

Appellants (Op. Br. pp. 106 to 108) quote certain general language from the *Provident* case, concluding with a statement that the land can never be permanently released from the obligation of the bonds until they are paid.

The Supreme Court of California, in saying this, obviously did not have in mind the operation of Secs. 81 to 84 of the Bankruptcy Act, but was speaking solely in the light of the provisions of the California Irrigation District Act.

It is respectfully submitted that the decree does not unlawfully take anything from appellants.

Eleventh Proposition: "The Liability of the Levee District, and of the Drainage District, and of the County of Riverside Was Not Taken Into Consideration by the Court."

This point was not urged upon the trial court.

Appellants review the provisions of the Levee District Act and the Drainage District Act, which provide for the levying of taxes to pay the bonds issued by these entities. Neither of these entities is a juridical person which can now be brought before a court. Both of them were merged into the person of the irrigation district by the terms of Sections 12 and 13 of the Palo Verde Irrigation District Act. The irrigation district assumed all their duties, functions and obligations. As heretofore stated, the irrigation district includes all territory which was in either of the defunct districts. There were only trifling strips which were in the levee district and not in the drainage district, or *vice versa.* The taxable property in question was substantially the same as that of the irrigation district. The irrigation district was substituted for them, with full and adequate powers to levy taxes and to pay the levee and drainage bonds. Under this substitution no harm was done to bondholders. As was held in *Moody v. Provident Irrigation District*, 96 Cal. Dec. 512, at p. 514:

> "Likewise, it is also well settled that the law in force at the time the bonds and coupons are issued by a district becomes a part of the contract. (*Hershey v. Cole,* 130 Cal. App. 683, 20 Pac. (2d) 972, and cases there cited.) These cases, however, do not

> limit the power of the legislature to provide for a subsequent method of payment *which does not impair* the existing rights of the bondholder; * * *."

Here we note again the provision of Section 83(b) which reads:

> "That the holders of all claims, *regardless of the manner in which they are evidenced,* which are payable without preference out of funds *derived from the same source or sources* shall be of one class."

Viewing the trifling discrepancies of the boundaries of the three districts, as *de minimis,* the *source* of payment of all the bonds is the same, to-wit, the taxable property of the valley. The bonds are all of one class and no difference in price is called for.

Appellants state (with emphasis) that the levee district is not a party to these proceedings. It could not be a party, except as it is a party as represented by its statutory successor, the irrigation district. Considering that all of the assets and liabilities, and ability to pay, of the irrigation district, including those belonging to the old levee and drainage districts, were fully laid before the trial court for its consideration, it is difficult to see, and appellants do not point out, what harm has come to them by the Court's disregarding the former separate entities of the levee and drainage districts, now some 16 years defunct.

Appellants vaguely hint at some responsibility of the County of Riverside in the premises. What money liability the county is under cannot be made out.

Twelfth Proposition: "The District Is Not Authorized by Law to Carry Out the Plan."

This is not one of the points presented to the trial court.

In this proposition appellants state, but do not argue, six points which will be hereinafter quoted, together with the answers to them.

> (1) "The state has not consented."

Answer: It has, as will be fully shown under the Thirteenth Proposition, which is to the same effect.

> (2) "The District's Securities Commission has not approved the plan adopted May 10, 1938."

Answer: The Commission is not required by Sections 81 to 84, inclusive, to approve any plan. It was so required by Section 80 of the old act.

> (3) "The authority of the R. F. C. to loan further expired in 1936."

Answer: Appellants do not indicate, and we have not found, any statute which so provides.

> (4) "The people voted on a plan in June, 1934, which is fully executed."

Answer: The refinancing bonds which were voted on have never been issued.

> (5) "The R. F. C. resolution of 1934 contains provisions which the district cannot perform, *e. g.*, a promise not to issue other bonds."

Answer: Section 10, Subdivision 2, of the Palo Verde Irrigation District Act gives the district board the general power, without limitation, to "make and execute all necessary contracts * * *".

(6) "The plan of composition of May 10, 1938, is not shown to be authorized by the board of trustees."

Answer: A certified copy of the resolution adopted by the board of trustees authorizing the commencement of these proceedings and concluding with an express approval of the plan of composition was offered and received in evidence as Petitioner's Exhibit 2. [Tr. pp. 36 to 39.] This resolution is attached to the petition as Exhibit "E", and is not denied by appellants' answer.

Thirteenth Proposition: "The State Has Not Given Its Consent."

This proposition was not argued before the trial court.

Appellants argue that Chapter 4 of the California Statutes of 1934 (Extra Session), in which the state expressly gave its consent to bankruptcy proceedings on the part of its taxing districts, violates Article I, Section 16, of the State Constitution, prohibiting the state from impairing contracts, unlawfully delegates judicial power, in violation of Article VI, Section 1 of the State Constitution, and the Tenth Amendment of the Federal Constitution, and amounts to an attempted surrender of the power of taxation, in violation of Article XIII, Section 6, of the State Constitution; also attempts to take private property for the payment of public debt, in violation of Article XI, Section 15, of the State Constitution.

Appellants claim that they are entitled to reopen this question because the Chief Justice in the *Bekins* case remarked in this connection:

> "We have not been referred to any decision to the contrary."

This Court should have before it the full and illuminating discussion of the point as written by the Chief Justice (304 U. S., commencing at page 47):

> "It is unnecessary to consider the question whether Chapter X would be valid as applied to the irrigation district in the absence of the consent of the state which created it, *for the state has given its consent.* We think that this sufficiently appears from the statute of California enacted in 1934. Laws of 1934, Ex. Sess., ch. 4. This statute (Section 1) adopts the definition of 'taxing districts' as described in an amendment of the Bankruptcy Act, to-wit, Chapter IX, approved May 24, 1934, and further provides that the Bankruptcy Act and 'acts amendatory and supplementary thereto, as the same may be amended from time to time, are herein referred to as the "Federal Bankruptcy Statute".' Chapter X of the Bankruptcy Act is an amendment and appears to be embraced within the state's definition. We have not been referred to any decision to the contrary. Section 3 of the state act then provides that any taxing district in the state is authorized to file the petition mentioned in the 'Federal Bankruptcy Statute'. Subsequent sections empower the taxing district upon the conditions stated to consummate a plan of readjustment in the event of its confirmation by the federal court. The statute concludes with a statement of the reasons for its passage, as follows:
>
> " 'There exist throughout the State of California economic conditions which make it impossible for property owners to pay their taxes and special assess-

ments levied upon real or taxable property. The burden of such taxes and special assessments is so onerous in amount that great delinquencies have occurred in the collection thereof and seriously affect the ability of taxing districts to obtain the revenue necessary to conduct governmental functions and to pay obligations represented by bonds. It is essential that financial relief, as set forth in this act, be immediately afforded to such taxing districts in order to avoid serious impairment of their taxing systems, with consequent crippling of the local governmental functions of the state. This act will aid in accomplishing this necessary result and should therefore go into effect immediately.'

"While the facts thus stated related to conditions in California, similar conditions existed in other parts of the country and it was this serious situation which led the Congress to enact Chapter IX and later Chapter X."

Again the Supreme Court says, at page 52:

"It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in treaties and conventions in the international field, by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord. Oppenheim, International Law, 4th Ed., Vol. I, Pars. 493, 494; Hyde, International Law, Vol. II, Par. 489; Perry v. United States, 294 U. S. 330, 353; Steward Machine Company v. Davis, 301 U. S. 548, 597. The reservation to the states by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution."

This statement disposes of the argument based on the Tenth Amendment and Article VI, Section 1 of the California Constitution. The Supreme Court says further, at page 52:

> "While the instrumentalities of the national government are immune from taxation by a state, the state may tax them if the national government consents (Baltimore National Bank v. State Tax Commission, 297 U. S. 209, 211, 212) and by a parity of reasoning the consent of the state could remove the obstacle to the taxation by the federal government of state agencies to which the consent applied."

This settles appellants' point as to Article XIII, Section 6, of the State Constitution.

Finally the Court holds, at pages 53, 54:

> "In the instant case we have cooperation to provide a remedy for a serious condition in which the states alone were unable to afford relief. Improvement districts, such as the petitioner, were in distress. Economic disaster had made it impossible for them to meet their obligations. As the owners of property within the boundaries of the district could not pay adequate assessments, the power of taxation was useless. The creditors of the district were helpless. The natural and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation. The bankruptcy power is competent to give relief to debtors in such a plight and if there is any obstacle to its exercise in the case of the districts organized under state law it lies in the right of the state to oppose federal interference. The state steps in to remove that obstacle. The state acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy

> power to save its agency which the state itself is powerless to rescue. Through its cooperation with the national government the needed relief is given. We see no ground for the conclusion that the Federal Constitution, in the interest of state sovereignty, has reduced both sovereigns to helplessness in such a case."

By implication this disposes of appellants' argument under Article I, Section 16, and Article XI, Section 15 of the State Constitution.

It seems impossible to conclude otherwise than that the Supreme Court held that the 1934 State Act consenting to bankruptcy proceedings was a sufficient and valid consent, if consent is requisite, for the proceedings under Sections 81 to 84 of the Bankruptcy Act. The Court expressly so held and this Court is bound by the decision.

Appellants refer to the fact that since the appeal was taken in this cause the 1934 State Act was repealed by California Statutes 1939, Chapter 72. The 1939 Act is brief and simple. For convenient reference it is printed in the appendix to this brief, at page 4. Section 1 authorizes any taxing agency or instrumentality of the state, as defined in Section 81, to prosecute all proceedings permitted by Sections 81 to 84. The state expressly consents to the adoption of Sections 81 to 84 and their application to its agencies and instrumentalities. Section 2 validates all proceedings heretofore filed under Sections 81 to 84 by any taxing agency or instrumentality. Section 3 repeals the 1934 Act, with a saving clause that such repeal shall not impair nor affect any existing proceedings under Sections 81 to 84. Section 4 is an urgency clause, under which the act went into immediate effect April 21, 1939.

It is respectfully submitted that under both the 1934 and 1939 State Acts above mentioned, the state has adequately, for all purposes, consented to the jurisdiction of the Federal Court in composition cases under Sections 81 to 84 of the Bankruptcy Act.

Fourteenth Proposition: "The Act Is Unconstitutional in That it Violates the Federal Constitution."

This point was not suggested to the trial court.

Appellants would now have this Court hold that Sections 81 to 84 are unconstitutional and in violation of the Fifth Amendment, the Tenth Amendment and Article I, Section 10, Clause 1, of the Federal Constitution. Of course, present counsel for appellants were counsel for the bondholders in the *Bekins* case, and argued and briefed these propositions exhaustively in the *Bekins* case. They now say that at the time of the decision in the *Bekins* case there was no "final and clear decision" by the California courts that the functions of California irrigation districts "were strictly governmental"; that the state courts have now rendered such decisions; and that, under the *Erie R. R. Co.* case, this Court should reexamine the constitutional questions so thoroughly argued in the *Bekins* case.

What counsel mean by "final and clear decision" by the state courts appellee cannot understand. No decision by any appellate court is so *final* as to prevent restatement,

amplification, qualification, or possibly even reversal by the same court.

The governmental nature of the functions of an irrigation district has been *clear* ever since the decision in *Turlock Irr. Dist. v. Williams,* 76 Cal. 360, in which the Supreme Court in 1888 held constitutional the original Wright Act of 1887. This decision was followed by *In re Madera Irr. Dist.,* 92 Cal. 296, 315, 321, and many other decisions, of which *Crawford v. Imperial Irr. Dist.,* 200 Cal. 318; *Morrison v. Smith Bros., Inc.,* 211 Cal. 36, and *Wood v. Imperial Irr. Dist.,* 216 Cal. 748, may be mentioned.

The Court in the *Morrison* case carefully distinguishes between governmental and proprietary character. It says, as to irrigation districts, at page 40:

> "In reference to this type of organization the law is well settled that, subject to certain exceptions not important in this case, they are not liable for the torts of their agents, upon the theory that they are state agencies, *performing a governmental function.* (*Whiteman v. Anderson-Cottonwood Irr. Dist.,* 60 Cal. App. 234, 236 (212 Pac. 706); *Nissen v. Cordua Irr. Dist.,* 204 Cal. 542 (269 Pac. 171).)"

In the light of these decisions there is nothing new to be brought to the attention of this Court or the Supreme Court under the doctrine of the *Erie R. R. Co.* case. Regardless of this, we call attention again to the fact that

the *Bekins* and *Erie* cases were decided by the Supreme Court on the same day and were under consideration at the same time, and that the petition for rehearing in the *Bekins* case filed by present counsel for appellants was denied nearly a month after the two cases were decided.

The circumstances referred to in the last paragraph of appellants' argument in the Fourteenth Proposition have all been disposed of hereinbefore, except the concluding clause, which intimates that the legislation benefits "private mortgages on property and increases the value of private property rights in lands and buildings within the district". Reference has already been made to the scaling down of delinquent taxes due the County of Riverside and the compromising of the bonds of the City of Blythe. In addition, it appears from the testimony of the principal financer of cotton crops in the valley [Tr. p. 183] that his company in 1935 voluntarily reduced its overdue loans in the valley by an average of 90%. In many cases the banks and insurance companies scaled mortgages and trust deeds down [Tr. p. 312], one witness testifying that such voluntary reductions had amounted to more than 75% [Tr. p. 320]. It thus appears that appellants' contention is theoretical, rather than actual.

C. CONCLUSION.

The Palo Verde Irrigation District is an isolated, desert farming community, nearly a hundred miles from any other community. It is not an important part of the taxable wealth or business activity of the Nation. But its plight typifies a grave and widespread National problem, which our government has earnestly striven to solve.

The district is not made up alone of farming lands, canals, implements and houses. Primarily, it is made up of pioneer American men and women who have made in this valley their homes. They have built their churches and schools, their social and civic organizations and have reared their children in this frontier spot.

They have been overwhelmed by successive physical and economic disasters. The weaker ones, or those with shallower roots, drifted away. But, as the record reflects, those who remained have worked hard, have eked along on a very low standard of living and have done their best, through economy in operation of their district, to cut their coat to fit their cloth.

In doing this, these people have exhausted, not only their material resources, but almost all the strength and courage they had. They have carried on, not only against the harshness of extreme desert heat and frontier hardships, but also against the almost certain prospect that they would lose their homes and that they and their children would become derelicts. As one witness grimly said [Tr. p. 322]: "These people have stayed in the valley because they had quite a bunch of guts and some hope."

This slim hope our government has sought to realize. It was to save just such broken communities and such homes and to keep such people self-supporting and self-

reliant, that the Congress of the United States, by Section 36 of the Emergency Farm Mortgage Act of 1933, authorized Reconstruction Finance Corporation to refinance irrigation, drainage and levee districts. It soon developed that, in almost every such district, a few bondholders were obstructing a refinancing by demanding their pound of flesh. (See Committee hearings, cited in Mr. Justice Cardozo's dissenting opinion in the *Ashton* case.)

The Congress has found a way out, so that its purpose should not be thwarted. It adopted Chapter IX, and later Chapter X, of the Bankruptcy Act. The Supreme Court, by its sweeping and conclusive decision in the *Bekins* case, held the latter Act constitutional. It was then thought that the great social purpose of the Congress could be made effective.

But a tiny residue of the bondholders has continued to fight a last-ditch battle to keep from being obliged to take that which has been abundantly demonstrated to be fair and equitable. In this, they stamp themselves as unfair and inequitable.

We cannot help but think that, in the consideration of this cause, this Court will devote its chief attention, not to the grammar and punctuation of the Statutes in question, but to the vital principles which the Congress has embodied in the Acts, in order to carry out its manifest social purpose, as recognized and expounded by the Supreme Court, and that this Court will affirm the decision in the Court below.

Respectfully submitted,

STEWART, SHAW & MURPHEY,

ARVIN B. SHAW, JR.,

WM. L. MURPHEY,

Attorneys for Appellee.

APPENDIX.

Appellee's Exhibit 4.

Palo Verde Drainage District

Date	Amount	Price
12/11/30	$ 1,000.	12½F
3/31/32	5,000.	7½F
6/10/32	6,000.	4¾F
6/13/32	4,000.	4½F
8/19/32	3,000.	5½F
11/23/32	2,000.	2¾F
2/15/33	1,000.	2¼F
9/27/33	6,000.	5½F
10/9/33	5,000.	6¼F
10/11/33	5,000.	6F
10/31/33	10,000.	6F

Palo Verde Joint Levee District

Date	Amount	Price
2/20/31	$ 3,000.	14F
3/31/32	5,000.	8½F
6/10/32	4,000.	4¾F
6/13/32	8,000.	4½F
7/27/32	9,000.	8 F
10/25/32	23,000.	4 F
12/16/32	7,000.	3¼F
2/7/33	1,000.	2 F
2/20/33	7,000.	3½F
5/12/33	25,000.	4 F
5/18/33	25,000.	5½ F
2/23/34	4,000.	15 F

Palo Verde Irrigation District

Date	Amount	Price
9/12/31	$ 4,000.	10 F
5/4/32	5,000.	5 F
5/11/32	5,000.	4½F
6/10/32	6,000.	4¾F
6/13/32	4,000.	4½F
6/22/32	12,000.	4⅛F
8/18/32	8,000.	7 F
8/29/32	5,000.	6 F
9/1/32	5,000.	5 F
9/7/32	5,000.	7 F
9/22/32	5,000.	5 F
9/27/32	7,000.	4¼F
12/30/32	5,000.	2 F
1/10/33	10,000.	3⅜F
6/13/33	7,000.	5¼F
6/21/33	1,000.	5 F
7/15/33	5,000.	6 F
10/2/33	5,000.	6 F
10/11/33	5,000.	6 F
10/15/33	10,000.	7 F
12/1/33	15,000.	7 1/6 F
12/22/33	5,000.	7 F
12/28/33	5,000.	9½F
1/30/34	15,000.	14 F

Date	Amount	Price
2/20/34	1,000.	15 F
2/23/34	1,000.	16¼F
2/27/34	10,000.	15¼F
3/1/34	3,000.	15½F
3/1/34	5,000.	15 F
3/6/34	10,000.	15¼F
3/7/34	10,000.	16 F
3/15/34	12,000.	16 F
4/13/34	1,000.	15¼ F
5/10/34	1,000.	18½F
5/25/34	1,000.	18½F
6/5/34	5,000.	18 F
6/5/34	5,000.	17½ F
6/7/34	2,000.	18 F
10/29/34	5,000.	20½F
11/1/34	5,000.	21½F

From this time on there was no actual trade in the bonds as far as we know. This was due to the expected cash settlement of the bonds by the RFC and consequently the owners retained their holdings in anticipation of settlement.

CHAPTER 72.

An act authorizing taxing agencies and instrumentalities to prosecute proceedings under sections 81, 82, 83 and 84 of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended, consenting to the adoption of the sections by the Congress, validating proceedings under or in contemplation of proceedings under the sections, and repealing Chapter 4 of the Statutes of the Extra Session of 1934, and declaring the urgency hereof.

[Approved by Governor April 20, 1939. Filed with Secretary of State April 21, 1939.]

The people of the State of California do enact as follows:

Section 1. Any taxing agency or instrumentality of this State, as defined in section 81 of the act of the Congress of the United States entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended, is hereby authorized to file the petition mentioned in section 83 of the act and to prosecute to completion all proceedings permitted by sections 81, 82, 83 and 84 of the act, as amended. The State of California hereby consents to the adoption of sections 81, 82, 83 and 84 by the Congress and consents to the application of sections 81, 82, 83 and 84 to the taxing agencies and instrumentalities of this State.

Sec. 2. Whenever any taxing agency or instrumentality of this State, as defined in section 81, has heretofore filed, or purported or attempted to file a petition under section 83 or has taken or attempted to take any other proceedings under, or in contemplation of pro-

ceedings under, sections 81, 82, 83 and 84, all acts and proceedings of such taxing agency or instrumentality and of the governing board or body and officers, attorneys and agents thereof, in connection with such petition or proceedings, are hereby legalized, ratified, confirmed and declared valid to all intents and purposes and the power of such taxing agency or instrumentality, governing board or body and officers, attorneys and agents to file such petition and take such proceedings is hereby ratified, confirmed and declared.

Sec. 3. The act of the Legislature of California entitled "An act in relation to relief from special assessments and in relation to financial relief therefrom, and of taxing districts, as defined in Chapter IX of the act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, as amended, validating petitions and proceedings under or in contemplation of proceedings under, said Chapter IX, and authorizing contribution by cities and counties toward the payment of such assessments, and declaring the urgency thereof, to take effect immediately," approved September 20, 1934, being Chapter 4 of the Statutes of the Extra Session of 1934, is hereby repealed, but the repeal of the act shall not impair nor affect any action or proceeding commenced under sections 81, 82, 83 and 84 while the act of the Legislature was in effect. Failure to comply with any of the requirements of Chapter 4 of the Statutes of the Extra Session of 1934 shall not impair nor invalidate any decree heretofore or hereafter rendered under the provisions of sections 81, 82, 83 and 84.

Sec. 4. This act is hereby declared to be an urgency measure within the meaning of section 1 of Article IV

of the Constitution, necessary for the immediate preservation of the public peace, health and safety and shall take effect immediately.

The facts constituting such necessity are as follows: Throughout the State of California economic conditions are such that in many localities it is impossible for property owners to pay taxes and special assessments levied upon real or personal property. The burden of such taxes and special assessments is so great that great delinquencies have occurred in collection thereof and a large number of special assessment districts, irrigation districts and other agencies and political subdivisions of the State have become delinquent upon bond issues and are under the necessity of making compositions with their bond creditors. This act is intended to afford means by which such agencies and political subdivisions may enforce proper compositions of such bonded and other indebtedness and it is essential that the relief herein provided be immediately afforded to such agencies and political subdivisions in order to avoid serious impairment of their taxing systems and consequent crippling of the local governmental functions of the State. This act should therefore go into effect immediately.

No. 9133

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

8

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation),

Appellants,

vs.

PALO VERDE IRRIGATION DISTRICT, an Irrigation District,

Appellee.

APPELLANTS' CLOSING BRIEF.

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No. 9133

IN THE

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For the Ninth Circuit

James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin (a corporation),

Appellants,

vs.

Palo Verde Irrigation District, an Irrigation District,

Appellee.

APPELLANTS' CLOSING BRIEF.

In this brief the appellants will limit themselves to replying to the appellee's brief. It will be impossible, however, to reply in a limited brief of twenty pages to all of the argument and statement of the appellee, and appellants will therefore have to rely largely upon their opening brief and upon the record itself. Appellants will not attempt to correct exaggerated statements of facts or statements of facts which do not appear in the record. Appellants have in their opening brief limited their statement to the printed record before the Court which is acknowledged to be a full and complete record, such acknowledgment

appearing in the record itself. The appellee, however, has gone beyond this record. One example of this is the exhibit set forth and attached to appellee's brief. This exhibit, while a part of the record in the lower Court, has been carefully summarized in the transcript agreeable to stipulation and order. Appellants cannot accept the statement of the case or statement of facts in appellee's brief except so far as it conforms to the actual record on this appeal.

PRELIMINARY STATEMENT.

Appeals are now pending before this Court in the bankruptcy cases of *Lindsay-Strathmore, Merced, Corcoran,* and *James* cases in addition to the instant case. The *Lindsay* case is on the calendar for argument the same time as the *Palo Verde* case, and presumably these two cases will be decided simultaneously. The *Merced* case is perhaps the most important of the cases tried in the lower Court. The record in that case is now complete and briefs are in course of preparation. That case will be ready for submission about the middle of November. The *Corcoran* appeal has now been docketed in this Court and the *James* case will shortly be docketed. This group of cases therefore are of great importance, because they are the first group of cases to come before this Appellate Court for review after the decision in the *Bekins* case upholding the constitutionality of Chapter IX. Furthermore, several cases are pending in the District Court of which quite a number have

already been tried and are now being briefed, and in one case at least, *Waterford,* the Court is awaiting the decision of this Court in these cases now on appeal.

The decision of this Court therefore will determine to a great extent the future credit, growth and welfare, not only of California irrigated valleys but of the entire state.

THE ECONOMIC BACKGROUND.

There has been a tremendous conflict going on in California of which these cases are the battleground. This conflict is between the bondholders with the senior or superior claim and a second group who have contributed to California's development by lending money on mortgages, on land and improvements in these irrigation districts. The contributions of the first group, the bondholders, and of the second group, have improved the conditions of the third group, the people of the district.

The first group has invested about one hundred million dollars in the general obligations of municipal bonds of irrigation districts, and has been given what is in effect a first claim upon all lands within the districts.

Time and again the Supreme Court of California and the Supreme Court of the United States have determined the nature and validity of the contract represented by these bonds, and irrepealable unlimited ad valorem taxes or assessments must be levied an-

nually to pay both principal and interest to service them. They have been held not to be secondary to state and county taxes. Their legal status is firmly established and the safeguards and remedies protecting other California municipal bonds are no better or stronger.

About one hundred districts voted and sold under stringent state supervision and control about one hundred million dollars worth of these bonds to finance the construction and acquisition of valuable water and property rights and to build thousands of miles of canals, drainage ditches, levies, and related permanent improvements. This investment has made all other developments in California's interior valleys possible. Without irrigation there would be little need for school houses, there would be small and uncertain crops, and no possibility of or permanent foundation for large cites. Prior to irrigation the land had a purely nominal or speculative value. In 1928 the same property was estimated by the California Irrigation Districts Association to be worth one billion dollars.

A certificate bearing the Great Seal of the State is affixed to each irrigation district bond, irrevocably declaring it a lawful investment for savings banks, insurance companies, and trustees, and eligible to secure deposits of state, county, and city funds. These are the only bonds ever issued in California so certified by the state.

Virtually all land reclamation improvements achieved in California during the past twenty-five

or more years has been with money loaned by these bondholders. These districts include about 4,000,000 acres, most of which are improved with orchards, dairies, and vegetable gardens and other farms. There are included in these districts the richest and most desirable country real estate in California. Districts such as Imperial and Merced include virtually entire counties. There are scores of cities, schools, road and other taxing districts inside the boundaries of irrigation districts, whose prosperity depends upon the success of the irrigation districts, and none of whose bonds rank ahead of the irrigation bonds.

These irrigation district bonds were distributed by the largest banks and bond houses with the recommendation of the State attached to each bond, and were purchased by savings banks, life insurance companies, trust funds, and by thousands of school teachers, doctors, and small business men. Many of them have been in terrible distress because on the strength of the State endorsement on the bonds they invested their life's savings in them.

These districts are held by the Supreme Court of California to be state agencies, and the property owned by these districts, no matter how acquired, is held to be exempt from taxation.

The second group which has invested money in irrigation districts consists of other banks, life insurance companies and private lenders who have advanced moneys secured by mortgages to individual farm or land owners.

The serious effect this situation has had upon some lending institutions is shown by a letter dated August 10, 1933, written by the President of the Pacific Coast Joint Stock Land Bank, in which he states that the total number of loans of that bank was 1896 representing an unpaid principal amount of mortgages of over fourteen million dollars. Out of this amount 52.24 per cent were in irrigation and reclamation districts.

It is a safe estimate that one-third of all the country real estate mortgage loans during the past twenty-five years in California are on land within these districts, and all of such mortgages are of course wholly junior to the tax secured bonds of the district.

Undoubtedly for the past several years the owners of lands in many districts have had a difficult time to meet their taxes and also to pay interest on their mortgages. Many irrigation district bonds as a consequence defaulted and the salability of the bonds suffered greatly. Under the irrigation district laws the bonds are a general obligation and every acre of the land is liable until all the bonds are fully paid. This has resulted in pyramiding of taxes, until, as has been shown in the *Palo Verde* case, practically 99 per cent of the land is now state owned.

It is a well known fact, a fact of which we think the Court can take judicial notice, that in many of these districts, large financial institutions with heavy mortgage loans, during the periods from 1932 to 1936, engaged in a program of quietly buying up many of these irrigation district bonds. This may not have

been as true a factor in Palo Verde as in other districts.

The fall in the price of bonds caused by the non-payment of taxes and consequent default in payment of principal and interest has been accelerated by a definite campaign to depreciate the value of district bonds by holders of farm mortgages in the districts. An inquiry about irrigation district bonds in practically any bank will bring the statement that they have little merit or value and that it is doubtful if they will ever be paid. In other words, there has been a widespread campaign to depreciate the value of these public bonds.

On the other hand it is to be noted that bonds of counties and cities and school districts and other bonds of taxing agencies have not been so attacked. It is a very odd thing to note that there has been no attempt to repudiate school bonds, and even in the *Palo Verde* case the bonds of these other taxing agencies, except the City of Blythe, are being paid in full while the bonds of the Palo Verde agencies against the same territory have for nearly 10 years been totally in default. There must be a reason for this, and the reason is that irrigation bondholders at the present time are the victims of a purge. In the case of school bonds the opposition from educators would be too great for the mortgage holding group to undertake any such propaganda.

The conflict between mortgage holders and bondholders has not been so apparent in the *Palo Verde* case as it has been in other cases, but the undersigned

counsel appears in four other cases now on appeal in this Court, and we take the opportunity here to present this background to the Court. It is apparent, as we have stated, and as the record shows, that bonds of other taxing agencies are being paid in full, whereas the irrigation bonds have been singled out for special treatment.

This further is apparent, that what the bondholder will lose in the *Palo Verde* case, the mortgage holder and the landholder will gain. A reorganization plan may not be approved as fair and equitable over the objection of a single creditor if it diverts to stockholders any assets which, because of the insolvency, belong solely to creditors. (*In re Philadelphia & Redding Coal & Iron Co.,* 105 Fed. (2d) 357.) It is our solemn contention that this gain of the mortgage holder and land holder, at the expense of the bondholder, is a violation of the principles of the *Boyd* case and that when there is little prospect of rehabilitating the landholder or where that rehabilitation can only be at the expense of the bondholder it should not occur;—rather the district should in good faith perform its duties as trustee for the bondholder and operate the property of this great valley as the trust which it is, and for the use and benefit of the bondholders and the state. The appellee has stated that these bondholders had their opportunity to take the land at one time. We desire to bring sharply to the attention of the Court the fact that appellants were not parties to the Florence Clark lease and option, and that the appellants in this case have never been

under any obligation or in any relation of duty under which they were called upon nor could be called upon to operate the property of the district or take its land. That is and always has been the duty of the officers of the district.

It cannot be denied that the Palo Verde valley has suffered. These difficulties were, not so much, although partly, the effect of the depression, as they have been the effect of floods before the Colorado River dam was built. Appellants declare that there has been and is a solemn duty, not only on the part of the counties within which this district mainly lies, but on the part of the State of California and perhaps more particularly on the part of the United States Government. It has long been a recognized fact that flood control is a federal duty. It certainly has been a duty which the Federal Government has recognized and repeatedly undertaken. It was because of this duty that the Palo Verde matter was presented to the Congress of the United States by a committee headed by Dr. Elwood Mead. The irrigation district endeavored to get federal aid for the district. (Tr. p. 194.) The bill was never passed by Congress, however. A committee also went to Sacramento and met with Mr. Meek, the Director of Public Works, and the State Engineer, and made a report to the Secretary of the Interior regarding the valley. (Tr. p. 195). But these pleas from the stricken valley went unheeded both by Congress and the State. It is now proposed that in fulfillment of these obligations the Federal Government should generously loan $1,000,-

000 to the valley at 4% interest (which is exceedingly good interest in these difficult times), and that the bondholders should make all the contribution.

The duty on the part of the Federal Government in the matter of overflow and flood has long been recognized in our history. Statutory expression of the duty on the part of the state is recognized by the Arkansas Act of September 28, 1850, Title 43, Sec. 982, U. S. C., wherein Congress granted to the several states the swamp and overflow land to enable the states to construct levies and drains and to use the proceeds for that purpose. This, it has been held, implies a duty to drain the land. *In re Crawford Levy & Drainage District,* 294 U. S. 598. In the case of *Los Ängeles v. Pacific Coast Steamship Company,* 45 Cal. App. 15, it was held:

> "the city took title to such land in its governmental capacity for the purpose of administering the trust imposed by the federal government".

All of the irrigation districts in California, except the Palo Verde District, have been formed under the general irrigation district law, and it has been brought to the attention of the Court that this district exists under a separate act. Its duties and functions, however, are largely the same. The appellee does point out one minor difference in that Section 52 of the General Law provides for payment out of the trust funds in the order of presentation. There is no such comparable provision in the Palo Verde Act. But what we are particularly concerned with here is to point out that these districts are

merely agencies performing the duty of and for the state in draining and irrigating the land, and more particularly are they performing the duty of and for the state and the national government in flood control.

In the case of *People v. Sacramento Drainage District,* 155 Cal. 373, 381, 385, it was said:

> "the state could accomplish this very work without organizing the district as such at all, and without giving the landowners within the district any voice in the selection of the managers or trustees. * * * In fact historically, such was the original method adopted * * *." (Referring to 23 Hen. VIII, Chap. 5, Par. 1, (1531).)

Therefore, it always has been the duty of the National and State Governments to protect the people of the Palo Verde valley, in a general way and out of general funds, from the ravages of flood and from lack of drainage. We do maintain that to force through the plan of composition in this case by strained construction, by disregarding the plain import of words, by what amounts to a revival of legal fictions, and by almost summary Court procedure (the hearing did not last over an hour) without any investigation by or through the Court other than the reception of evidence offered by the petitioner, is to shield the failure to give just relief behind a disregard of constitutional and legal and equitable principles which ought not to be permitted by our Courts of review. It does not seem necessary to the protection of this district to so destroy the fine web of legal and logical processes of thought.

Before closing this introductory statement we wish to say that we have deemed it necessary to review the background of these cases not only on account of this case but of others before this Court under Chapter IX.

We desire to point out one further respect in which it is the duty of the state to relieve property from burdensome assessments and to discharge just obligations which those assessments recognize.

In the case of *Hopkins Federal Savings and Loan Association v. Cleary,* 56 Sup. Ct. Rep. 235, Mr. Justice Cardozo speaking for the Court said:

> "* * * there is thus the duty of the parens patriae to keep faith with those who have put their trust in the parental power".

In the case of *Williamsburg Savings Bank v. State,* 153 N. E. 58 (New York, 1926—Cardozo concurring) the Court said:

> "It was in essence, if not in legal technicality, a state project; and that the state was in right and justice obligated and bound to make sure that the securities issued by the state officers to provide funds for carrying out the project would be paid, even though technically the state was not primarily liable therefor."
>
> "Fortunately, and creditably to them, our courts have firmly established the proposition that the state, as well as an individual, may be honorable and may voluntarily recognize just obligations which it fairly and honestly ought to pay, even though they do not constitute purely legal claims * * *."

If public interest requires, resort should be had to the taxing power so that the burden of relief afforded in the public interest may be borne by the public. *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 602; *County of Los Angeles v. Jones,* 6 Cal. (2d) 695; *County of San Diego v. Hammond,* 6 Cal. (2d) 709; *City of Crescent City v. Moran,* 92 C. A. D. 458.

In the *Hammond* case a resolution of the Board of Supervisors:

> "* * * and that the general county interest will be served and promoted by the expenditure of county funds for the refunding and adjustment of the outstanding bonded indebtedness of said district * * *."

was approved, the Court also saying:

> "Under such circumstances can it be doubted that the main purpose of the appropriation is public in nature?"

And referring to irrigation districts within the county, said:

> "We cannot say as a matter of fact or as a matter of law that the board of supervisors may not in some legal and equitable manner secure the restoration of said lands within irrigation districts to the tax rolls of the county through the refunding proceedings now pending before the board."[1]

Appellants will next consider appellee's argument, adopting the same order as appellee.

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1. It is to be noted that the refunding proceedings referred to were entirely and 100% voluntary. See case of *County of Los Angeles v. Rockhold,* 3 Cal. (2d) 192.

A. APPELLANTS ARE ENTITLED TO URGE ALL OF THEIR FOURTEEN POINTS.

The rule is stated at 3 C. J. 696, as follows:

> "* * * the general rule in such cases being that if a defendant in the trial court, by failure to plead, to request instructions or introduce evidence, to object to instructions or evidence, or otherwise, fails to present a defense which he might make, and submits issues not involving it, he will be bound in the appellate court by the case made by the pleadings and evidence as exhibited by the record, * * *"

The mistake that appellee makes *is in that the appellee* cannot for the first time on appeal object that the answer is defective in its statement of any defense or that it is otherwise insufficient. In *Campbell v. U. S.,* 224 U. S. 99, 32 Sup. Ct. 398, the Court said:

> "The power of that court was limited to a consideration of such questions of law as may have been presented by the record proper, * * *"
>
> "If the answer did not put in issue the allegation of the complaint respecting the default of the principal in the bond, this claim is well founded, otherwise it is not."

Saying further:

> "But of this it is enough to say that no such objection was raised in the District Court, but, on the contrary, the answer was treated as sufficient in that respect. This being so, the plaintiff was not at liberty to raise the objection in an appellate court. Had it been made seasonably it could, and doubtless would, have been avoided by an amendment."

Rusch v. Kansas City First National Bank, 71 Fed. 102, where the Court said:

> "We need not stop, however, to consider the latter contention; for, even if it be true that the second counterclaim did state a cause of action different from that alleged in the first answer, still the question now argued was not raised by the demurrer, and is not available in this court. Even if the plaintiff was privileged to demur to the amended answer on the ground that it was a departure from the original pleading, it did not do so. The point that there was a departure is raised for the first time in this court, and for that reason it cannot be noticed."

Smith and Davis Manufacturing Company v. Mellon, 58 Fed. 2705, where the Court said:

> "While this defense may not have been pleaded with technical accuracy, yet the testimony tending to establish it was received on the final hearing without objection. The first time the question has been raised it appears from the record is on the argument of the appeal in this court; here it is too late."

Also the question of jurisdiction of the subject matter may be raised for the first time in the Appellate Court. *Chapman v. Barney,* 129 U. S. 677, 9 Sup. Ct. 426; *Cameron v. Hodges,* 127 U. S. 322, 8 Sup. Ct. 1154.

This appeal is a trial de novo. *Hopkins v. Texas Co.* (C. C. A. 10), 62 Fed. (2d) 691; *Boynton v. Moffat Tunnel Impr. Dist.,* 57 Fed. (2d) 772. Writ of certiorari denied, 287 U. S. 620, 53 Sup. Ct. 20.

The only question therefore is, were these fourteen defenses raised by the appellants.

Chapter IX provides that any creditor affected by the plan may file an answer controverting any of the material allegations and setting up any objection he may have to the plan. (Section 83 (b).) This provision does not seem even to require that objections other than denials and *objections to the plan* need be set forth; so it goes on to provide that the Court (Subsection d) may not confirm the plan until it has been accepted in writing by two-thirds of the creditors. And subdivision (e) provides that at the conclusion of the hearing the Court shall enter a decree, *if satisfied;*—that the plan is fair; that it complies with the provisions of the chapter, that it has been properly accepted; that all amounts paid by petitioner are reasonable; that the plan is in good faith; and that the petitioner is authorized by law to take all action necessary to carry it out.

It would therefore seem that there is no requirement on the behalf of any creditor to bring any of these matters to the attention of the Court. The Court is required to make these special findings.

However, the appellants *did* raise each and every one of their points in their answer (Tr. p. 57) and no objection was made by the appellee to the sufficiency of the pleadings. It is therefore too late for the appellee to raise any such question in relation thereto on this appeal.

Furthermore, the record is full of objections to the introduction of testimony of motions, stipulations, evidence and of argument on points affecting these various defenses. The appellants even brought some of the matters to the attention of the Court by means of their disapproval and objections to the findings. (Tr. p. 124.) The narrative statement of evidence shows (Tr. p. 147) that the cause came on for hearing upon the petition and the *answer* and *objections* of the appellants. The minute order of the Court (Tr. p. 91) shows that the "objections" heretofore filed by the appellants were overruled. Since the three objections which appellants made to the introduction of evidence at the opening of the hearing were oral objections the Court could only have referred to the *written* objections which were filed by the appellants, and which are set forth at transcript page 57. The stipulation of the parties (Tr. p. 46) shows that the transcript of the evidence was to be introduced in evidence not only with the evidence but objections and rulings thereon. An example of an objection to testimony is shown at transcript page 265. Respondents objected to the introduction of Petitioner's Exhibit 29 purporting to show unpaid principal and interest. This objection was made upon the theory that the district has been in fact refinanced. (Fourth Proposition.) A written stipulation (Respondents' Exhibit I, Tr. pp. 295 to 307) was introduced into evidence. This stipulation covered evidence on many points which have been urged by the appellants.

Much other testimony by way of written documents, cross-examinations and stipulations was also introduced by the appellants on their theory of the case.[2]

B. APPELLANTS' FOURTEEN POINTS.

In the few allotted pages which remain it will be impossible to discuss or reply to the arguments of the appellee upon each of the fourteen points, and appellants will have therefore merely to make brief comments upon some of the fourteen points presenting the same in numerical order as set forth in the opening brief and in appellee's brief. At the outset we wish to state that it will be impossible to correct statements of fact. We do not, however, accept appellee's interpretation of the fact of the case and respectfully request the Court to read the important parts of the not too lengthy transcript on appeal which we have referred to at page 2 of our opening brief.

FIRST PROPOSITION: BY THE TERMS OF THE STATUTE THE COURT WAS WITHOUT JURISDICTION.

This matter is discussed rather thoroughly in appellants' reply brief in the *Lindsay-Strathmore Irrigation District* case which appellants understand will be argued at the same time as this case and we pray that the Court will refer at least to the reply brief in that case under this same heading.

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2. The reporter's transcript of the proceedings of July 18. 1938, is on file in this Court although not a part of the printed record on appeal. If it should not be deemed that appellants have shown otherwise that all their points were raised below the reporter's transcript sufficiently showed this.

SECOND PROPOSITION: THERE IS ANOTHER ACTION PENDING IN THE STATE COURTS OF CALIFORNIA UPON THE SAME IDENTICAL CAUSE, ETC.

Appellants frankly admit that in their opinion California Stat. 1937, Chapter 24, is unconstitutional, but when one of the undersigned counsel presented that contention to the Supreme Court of California before a trial on the merits in the *South San Joaquin* case the Court called attention to Section 5 of the Act, which provides that the filing of the petition shall automatically enjoin and stay the commencement or continuance of suits or proceedings against the district, and providing:

> "The court in which said petition is filed shall have exclusive jurisdiction with respect to all suits, actions and proceedings against the district * * *."

The Court said:

> "The petitioner insists that the court should not deem itself governed by the foregoing statutory stay, for the reason, so it is claimed, that the statute is unconstitutional, and it is urged that this court explore the provisions of the act, declare it unconstitutional, and proceed herein notwithstanding."

Saying also:

> "* * * the Superior Court has jurisdiction in the first instance to pass upon the validity of the act of March 30, 1937 * * *."
>
> *Morris v. South San Joaquin Irrigation District,* 72 Pac. (2d) 154, 9 Cal. (2d) 781.

And we are again reminded of Subsection (i) of Section 83 of the Bankruptcy Act, which provides:

> "Nothing contained in this chapter shall be construed to limit nor to impair the power of any state to control by legislation *or otherwise* any municipality or any political subdivision of or in such state in the exercise of its political or governmental powers including expenditures therefor." (Italics ours.)

THIRD PROPOSITION: THE CAUSE IS RES JUDICATA.

The facts relative to the district's first bankruptcy petition under Section 80 are set forth at and following transcript page 295. At page 298 it is stated that the cause came on before the Court and was tried upon the merits and that on November 8, 1936, Judge Cosgrave entered a judgment of dismissal on the grounds of the unconstitutionality of the Bankruptcy Act, Sections 78-80, and the Palo Verde Irrigation District appealed.

The action of the Circuit Court of Appeals in that regard is set forth in 88 Fed. (2d) 1016, where it was

> "ordered appeal in above cause dismissed for failure of the appellant to file record and docket cause; * * *."

The stipulation on page 296 of the transcript shows that the plan set forth in the petition under Section 80 "provided substantially the same terms as to bondholders as the plan in the instant case".

U. S. C. A. Title 11, Section 303a, Subsection (1), provides:

> "If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter or the application of such provision to other persons or circumstances shall not be affected thereby."

In *Ashton v. Cameron County Water Improvement District,* 298 U. S. 513, Mr. Justice McReynolds in the majority opinion said:

> "The Act has been assailed upon the grounds that it is not in any proper sense a law on the subject of bankruptcy, and therefore it is beyond the power of Congress; * * * we assume for this discussion that the enactment is adequately related to the general 'subject of bankruptcies'."

There can be no question of the bankruptcy Court's jurisdiction in composition. *Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & Pac. R. Co., et al.,* 294 U. S. 648, 79 L. Ed. 1110.

It is appellants' contention that the decree of the District Court entered by Judge Cosgrave on November 8, 1936, is *res adjudicata* of the issues in this case.

Baker v. Cummings, 181 U. S. 117, 21 Sup. Ct. 578, 45 L. Ed. 776 (1901);

Dowell v. Applegate, 152 U. S. 327, 345, 14 Sup. Ct. 611, 38 L. Ed. 463, 470 (1893);

Johannessen v. United States, 255 U. S. 227, 238, 32 Sup. Ct. 613, 56 L. Ed. 1066, 1070 (1911);

Reed v. Allen, 286 U. S. 191, 52 Sup. Ct. 532, 79 L. Ed. 1054 (1932);

United States v. Throckmorton, 98 U. S. 61, 65, 68, 69, 25 L. Ed. 93, 96.

The Courts have almost uniformily held that judgments rendered under unconstitutional acts are nevertheless valid until said judgments have been set aside or reversed. A good illustration of such a case is that of *Woods Bros. Construction Co. v. Yankton County,* 54 Fed. (2d) 304; see also *Phebus v. Search,* 264 Fed. 407; *Cutler v. Huston,* 158 U. S. 423, 15 S. Ct. 868.

As said in the *City of Watertown v. Eastern Dakota Electric Co.,* 296 Fed. 832:

> "* * * overruling a former decision does not reverse the judgment duly rendered in the case overruled, or affect the rights of the parties to that decree. That judgment remains res adjudicata."

See also:

New Orleans v. Citizens' Bank, 167 U. S. 371, 398, 17 Sup. Ct. 905, 914;

Southern Pacific R. R. v. United States, 168 U. S. 1, 49, 18 Sup. Ct. 18, 42 L. Ed. 355;

Postal Telegraph Cable Co. v. Newport, 247 U. S. 464, 38 Sup. Ct. 566, 62 L. Ed. 1215.

In *Stoll v. Gotlieb,* 305 U. S. 165, the United States Supreme Court said:

> "* * * After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. * * *"

"* * * It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined."

FOURTH PROPOSITION: RECONSTRUCTION FINANCE CORPORATION IS NOT A CREDITOR AFFECTED BY THE PLAN.

Appellants can merely make some very brief comments and will rely upon their opening brief and the record in the case.

1. The limitation upon the power of the district by the authority given by the election of the people and the approval of the Districts Securities Commission distinctly limits the authority of the Board of Directors in making its contract with the R. F. C.

2. Appellants have the right to raise the question of ultra vires when their rights are affected. Certainly also appellants have the right to contend that the contract should be construed, if possible, within the powers of the district and of the R. F. C.

3. Title 15, Section 604a, provides that no funds shall be disbursed by the R. F. C. on any loan commitment after the expiration of one year from the date of such commitment.

4. The power of the Reconstruction Finance Corporation under Section 403, Title 43, U. S. C., to *purchase* securities is limited by the requirement that it result in a reduction of the district's indebtedness.

FIFTH PROPOSITION: THE PLAN IS ONE FULLY EXECUTED OUT OF COURT, AND NOT PURSUANT TO THE STATUTE.

The enactment of Subdivision (j), Section 83, which as appellee conceives was for the purpose of reversing the *West Palm Beach* case, evidently was not intended to affect the rule of that case *in a situation where securities had not been exchanged.*

PROPOSITIONS SIXTH TO FOURTEENTH:

Further discussion of the propositions here set forth is not possible owing to the length of this brief. The points, however, are covered in the opening brief and we will merely make one or two very brief comments.

1. It has not and cannot be shown that the Mutual Water Company's mortgage bonds were superior to the effect of taxes levied for public purposes upon property within these districts. Appellants' conclusion and contention is that the levy of taxes for district purposes upon the real and personal property would have wiped out the lien of the Water Company bonds. Nothing in the record or which could have been introduced into the record would show any justification for a preference in favor of the holders of those bonds.

2. In the case of *McKaig v. Moutrey,* 90 C. A. D. 335, 90 Pac. (2d) 108, and *River Farms Co. of Calif. v. Gibson,* 4 Cal. App. (2d) 731, 42 Pac. (2d) 95, the Courts of our state have held that the bondholder is the direct beneficiary of the trust funds. In the *McKaig* case the Court said:

"* * * the assessment when so levied, became the property of the district and was held in trust for the bondholders under section 29 of the Irrigation District Act. St. 1909, p. 1075."[3]

CONCLUSION.

Appellants' fourteen points are fully sustained by the record and the law.

How poor the vision into the future is is now more apparent from rapidly rising prices of farm commodities. Who can say how slight a burden irrigation bond debt in California will be even a few years from now.[4]

Appellee states on page 70 "R. F. C. did not purchase its bonds as a part of a speculation by which to make a profit through these composition proceedings". Appellants are glad to have that concession. If the decree be reversed the Reconstruction Finance Corporation can still receive all it loaned. A reversal will not result in disaster or hardship to the district for it is 96% refinanced, nor will other than justice and equity be done these appellants.

---

3. Petition for writ of certiorari was filed in the United States Supreme Court August 14, 1939 in the case of *Vallette v. City of Vero Beach*, 104 Fed. (2d) 59, cited by appellee.

4. An item in the Los Angeles "Times", September 9th, is a dispatch from Des Moines, Iowa, September 8th, and reads as follows:

> "Federal Judge Chas. A. Dewey today decided to wait and see if the war might not raise prices sufficiently to save an Iowa farmer threatened with foreclosure. The judge turned down a request by the Equitable Life Assurance Society of New York for permission to bring a foreclosure action against Milton Edelman of Lost Nation, Iowa.
>
> 'If conditions are to be anything like before, he might rehabilitate himself', commented the judge."

This "tiny residue" of bondholders have not obstructed the plan or its fulfillment. Those bondholders who chose to surrender their bonds at 23¢ will not complain if appellants keep their bonds.

Dated, Turlock, California,
September 22, 1939.

Respectfully submitted,

W. Coburn Cook,
Chas. L. Childers,
Attorneys for Appellants.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

James H. Jordan, et al., *Appellants,* vs. Palo Verde Irrigation District (an irrigation district), *Appellee.*	No. 9133
Milo W. Bekins, et al., *Appellants,* vs. Lindsay-Strathmore Irrigation District, an insolvent taxing agency, et al., *Appellees.*	No. 9206
West Coast Life Insurance Company (a corporation), et al., *Appellants,* vs. Merced Irrigation District, *Appellee.*	No. 9242
A. A. Newhouse, et al., *Appellants,* vs. Corcoran Irrigation District, *Appellee.*	No. 9293
Gilbert Moody, et al., *Appellants,* vs. James Irrigation District, *Appellee.*	No. 9353

SUMMARY OF POINTS AND AUTHORITIES IN THE CASES OF PEOPLES STATE BANK v. IMPERIAL IRRIGATION DISTRICT, AND CLOUGH v. BABER AND COMPTON-DELEVAN IRRIGATION DISTRICT.

(Filed by Irrigation Districts Association of California as Amicus Curiae pursuant to permission at hearing of cause.)

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Cal. Juris., Vol. 16, p. 769, Sec. 8.................. 13

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES H. JORDAN, et al., *Appellants,* vs. PALO VERDE IRRIGATION DISTRICT (an irrigation district), *Appellee.*	No. 9133
MILO W. BEKINS, et al., *Appellants,* vs. LINDSAY-STRATHMORE IRRIGATION DISTRICT, an insolvent taxing agency, et al., *Appellees.*	No. 9206
WEST COAST LIFE INSURANCE COMPANY (a corporation), et al., *Appellants,* vs. MERCED IRRIGATION DISTRICT, *Appellee.*	No. 9242
A. A. NEWHOUSE, et al., *Appellants,* vs. CORCORAN IRRIGATION DISTRICT, *Appellee.*	No. 9293
GILBERT MOODY, et al., *Appellants,* vs. JAMES IRRIGATION DISTRICT, *Appellee.*	No. 9353

SUMMARY OF POINTS AND AUTHORITIES IN THE CASES OF PEOPLES STATE BANK v. IMPERIAL IRRIGATION DISTRICT, AND CLOUGH v. BABER AND COMPTON-DELEVAN IRRIGATION DISTRICT.

(Filed by Irrigation Districts Association of California as Amicus Curiae pursuant to permission at hearing of cause.)

At the conclusion of the oral arguments in this Court in the several irrigation district composition cases filed under Chapter IX of the National Bankruptcy Act, permission was given to summarize in not to exceed ten pages points and authorities in two cases now pending, one in the California Supreme Court and the other in the California District Court of Appeal for the Third Appellate District.

In the case of *Peoples State Bank v. Imperial Irr. Dist.,* now under submission to the Supreme Court, the plaintiff sought and seeks to enjoin the Imperial Irr. Dist. from filing or prosecuting a petition for relief under said Chap. IX of the National Bankruptcy Act. The contention therein made is that no irrigation district in California can, as a matter of law, adjust or compose its bond or other outstanding obligations under said Chapter. The contentions in that regard are two-fold. They are as follows:

1. That an enabling act of the state is a prerequisite and essential to the filing of a petition under said chapter and that the state cannot lawfully give this consent.

2. That Section 52 of the California Irr. Dist. Act (Act 3854 Deerings Gen. Laws) makes any of the proposed compositions impossible for a California irrigation district.

In the second case, *Clough v. Baber, and Compton-Delevan Irr. Dist.,* now under submission to said District Court of Appeal, the petitioner, Clough, seeks a writ of mandate to compel said District to

pay from available bond funds the bonds of the petitioner on the basis that those bonds are the first in order of presentation and registration as to all other bonds of the district. The answer or return in that cause pleads insolvency and the inability of the district to pay its bonded debt and its condition in that regard has been stipulated to. This case involves for the first time in any of the California Courts of last resort the definite proposition of whether proration should prevail as to available funds in the payment of bonds of an irrigation district where that district is insolvent. The contention made by the petitioner is that Section 52 of the District Act is controlling.

There are, therefore, only two major points involved in the two foregoing cases and this summary is confined to said two points and primarily to supplement the oral arguments.

CONCERNING CHAPTER IX OF THE NATIONAL BANKRUPTCY ACT BEING AVAILABLE TO CALIFORNIA IRRIGATION DISTRICTS.

It is contended by the appellants that a state enabling act is a prerequisite to an irrigation district filing or prosecuting a petition under Chap. IX of said Act; that such consent cannot lawfully be given by the state without effecting abrogation of contracts; and that the State Courts are the proper tribunals to determine these points.

Among other answers of the irrigation districts, it is submitted that the subject of bankruptcy is a

power reserved by the Constitution of the United States by Sec. 8 of Article I thereof, giving to Congress the authority and power to pass legislation effective throughout the United States and all its states on matters within the scope and subject of bankruptcy. That this reserve power antedates the Constitution of California, all legislation in California and that the matter is a federal and not a state question. That all dealings of all persons have since the adoption of the Constitution of the United States been subject to the right of Congress to deal with the subject of bankruptcy as Congress, from time to time, saw the needs in that regard.

The United States Supreme Court did *not* say in *Lindsay-Strathmore v. Bekins,* 82 Law Ed. 1137, 304 U. S. 27, 58 S. C. R. 811, that a state enabling act was necessary if the provisions of the bankruptcy act did not require it, but did say that the state enabling act actually passed (Chap. 4 Ex. Sess. 1934; Stats. 1935, page 5) was and is sufficient. (See p. 47 of 304 U. S. or p. 1142 of 82 Law Ed.)

The districts further contend that a state enabling act is not necessary unless required by Congress, as irrigation districts in California already have power to sue and be sued (Sec. 15b District Act) and to enter into contracts for and to borrow money from the United States Government (Act 3873 Deering's Gen. Laws, Sec. 1, et seq.) and the districts have been given power to issue funding and refunding bonds. (Secs. 32a, 32b, 32c, 32d, 32e, 32f, and 32½ of the

District Act.) That the present Chap. IX does not by its terms require the state's consent is admitted.

On the question of a State Court enjoining or otherwise interfering with the jurisdiction of a United States Bankruptcy Court it seems clear that insofar as Congress has acted upon the subject, the matter is exclusively a federal question for said Bankruptcy Courts and that the State Courts may not enjoin the filing or prosecution of such proceedings.

See:

First National Bank v. Sup. Ct., 12 Cal. App. (2d) 140 at 142; 55 Pac. (2d) 532;

Harris v. Pac. Mutual, 6 Cal. (2d) 384 at 385-6; 57 Pac. (2d) at 1299;

Remington on Bankruptcy, 4th Ed. Vol. 5, Sec. 2066;

In Re Yaryan and Naval Stores, 214 Fed. 563 at 565;

Morgan v. State, 242 S. W. 384, at 386, 154 Ark. 273 at 278;

DeKalb Tr. Etc. v. DePaul University, 278 Ill. App. 102 at 112;

City National Bank v. Davis Hotel, 280 Ill. App. 247 at 252;

In Re Drake Motor Mfg. Co., 16 Fed. (2d) 143 at 145;

In Re 4136 Wilcox Bldg., 86 Fed. (2d) 667 at 669.

CONCERNING "SECTION 52".

Appellants in the cases at bar contend that the provisions of Sec. 52 of the District Act create some sort of a preference or priority of each matured presented bond or coupon over all other bonds and coupons of that district.

This same argument was presented to the United States Supreme Court in the *Bekins* case, supra, and Sec. 52 and the case of *Bates v. McHenry* (123 C. A. 81) and the rule claimed to be therein established was specifically called to the United States Supreme Court's attention. It was claimed in the bondholders Appellees' briefs in said case that inasmuch as the petition disclosed that certain bonds had been presented and registered, that the petition could not state a cause of action under said Chap. IX, because Sec. 52 of the Cal. Irr. Dist. Act prevented the benefits of the Act. At pages 58 and 59 of the Appellees' brief before the United States Supreme Court we find the following:

> "Point C: Regardless of the constitutionality of the Act, the petition does not state facts sufficient to constitute a cause of action or give the court jurisdiction."
>
> "The petition shows that each bond and coupon is in a separate class and not payable without preference out of funds derived from the same source as required by Sec. 83, subd. b. for inasmuch as the petition affirmatively shows that the bonds and coupons have been presented as provided in Sec. 52 of the Cal. Irr. Dist. Act (Appendix) and are therefore payable in order of presentation and not prorata."

The United States Supreme Court rejected the contention despite the fact that on the same day it announced its decision in *Erie Railroad Company v. Tompkins,* 304 U. S. 64, 82 Law Ed. 1188, and despite the fact that *Bates v. McHenry* was cited and presented.

To the contention of the Appellants that Sec. 52 of the District Act and the decision in *Bates v. McHenry,* 123 C. A. 81, and subsequent cases cited by them, including recent cases before the Supreme Court of California, found in Vol. 12 Cal. (2d) established a preference or priority of each matured presented and registered bond or coupon over every other subsequently matured presented and registered bond or coupon or in effect a succession of separate preferences and priorities in the order of presentation, the irrigation districts answer as follows, in addition to other answers:

1. That Sec. 52 is purely procedural.
2. That Sec. 52 applies only in cases of temporary shortages in the bond fund.
3. That Sec. 52 and the decisions thereunder do not apply in cases of insolvency of an irrigation district or the irrigation district's bond fund.
4. That the only remedy of the bondholder is by mandamus and that that remedy is limited to proration by equity and the authorities, including California decisions.

1. SECTION 52 IS PURELY PROCEDURAL.

From 1897, the date of the passage of the California Irr. Dist. Act (Stats. 1897, p. 254, et seq.), the only provision in said Act relative to the payment of its bonds was found in Sec. 52 and read as follows:

> "Upon the presentation of the coupons due, to the Treasurer, he shall pay the same from the bond fund." (Stats. 1897, at p. 272).

In 1919, long after many of the bond issues involved in the various irrigation district compositions had been issued, Sec. 52 was amended by Chap. 339, Stats. 1919, p. 660 at 667, to read, insofar as the issues herein involved, as it now reads. Sec. 61a of the District Act relative to the payment of warrants was added to the Cal. Irr. Dist. Act in 1915 (Stats. 1915, p. 1367, at 1369) and provided for the first time for presentation and registration.

Thus, until 1919, the order of payment or disbursal was without specific statutory provision. That appellants herein deem Sec. 52 as it has stood since 1919 to be purely procedural is evidenced by the fact that they contend that the provisions apply alike to all bond issues, whether issued before or after 1919. It is the contention of the districts that Sec. 52 simply provides an orderly procedure and is designed to establish an equality between bondholders and prevent a preference. Such has been the construction in all of the cases in the trial Courts in bankruptcy proceedings so far relative to California Irrigation districts.

> *In Re Imperial Irr. Dist.*, 10 Fed. Supp. 832 at 845;

In Re James Irr. Dist., 25 Fed. Supp. 974 at 975;
In Re Merced Irr. Dist., 25 Fed. Supp. 981;
In Re Lindsay-Strathmore, 25 Fed. Supp. 988;
In Re Corcoran, 27 Fed. Supp. 322.

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2. THAT SEC. 52 AND BATES v. McHENRY AND SUBSEQUENT DISTRICT CASES APPLY ONLY IN CASE OF TEMPORARY SHORTAGE IN BOND FUNDS.

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3. EFFECT OF INSOLVENCY.

The appellants contend that the decision of *Bates v. McHenry* and subsequent decisions cited by them were intended to apply in all cases irrespective of insolvency. This is specifically refuted by the following language from the case of *Bates v. McHenry,* supra, (123 C. A. at 91):

> "Where there is only one fund or where all the assets of an insolvent concern are to be marshalled and payment made to creditors, equity will undoubtedly prorate the payments so that all bondholders or creditors may share therein. In the case at bar there is a continuing obligation on the part of the district to make payment and there are provisions in the irrigation district laws for the enforcement of that continuing obligation."

In none of the cases cited by the appellants was the issue of insolvency of the district or its bond fund an issue, pleaded or actually before the Court for

determination as to its effect. It is true the language concerning the condition of the districts is to be found in those cases.

In each of the cases: *Selby v. Oakdale Irr. Dist.*, 140 Cal. 171; *Shouse v. Quinley,* 3 Cal. (2d) 357; *Provident Land Corp. v. Zumwalt,* 12 Cal. (2d) 365; *El Camino Irr. Dist. v. El Camino Land Corp.,* 12 Cal. (2d) 378; *Clough v. Compton-Delevan Irr. Dist.,* 12 Cal. (2d) 385; the Court simply determined that the particular remedy or act sought to be done or accomplished would create or permit a preference as between bondholders *and in none of those cases was the issue of proration in cases of insolvency involved or presented.*

The appellants admit that the California Courts have laid down the rule that where there is not an inexhaustible taxing power, legally or otherwise, that the Courts have held that where there were insufficient funds, and particularly where there was insolvency, that proration would be ordered. Cases so holding are *Rohwer v. Gibson,* 126 Cal. App. 707; *Kimball v. Hastings Reclamation District,* 137 Cal. App. 687; *Cooper v. Gibson,* 133 Cal. App. 532; *River Farms v. Gibson,* 4 Cal. App. (2d) 731; and *Bank of Hawaii v. Gibson,* 15 Cal. App. (2d) 407.

It is contended by the appellants that these cases approving proration are not applicable to irrigation districts because irrigation districts in California have a legally inexhaustible taxing power. The answer to that position by the districts is that following the announcement in the case of *Morris, Mather*

v. Port of Astoria, 15 Pac. (2d) 385, that where the taxing power and the ability to collect on the part of the agency, though legally inexhaustible, was factually and from a practical standpoint non-existent because of insolvency or economic conditions, then proration was to apply, the California Courts adopted the same rule and that that rule applies to irrigation districts in California, despite Sec. 52 of the District Act.

The California Supreme Court in *Kerr Glass Mfg. Co. v. San Buenaventura,* 7 Cal. (2d) 701, at 707, et seq. analyzed the *Port of Astoria* reasoning and theory and definitely and pointedly approved of the rule. Thereafter the Supreme Court denied a hearing in *District Bond Company v. Cannon,* 20 Cal. App. (2d) 659, in which the District Court of Appeal pointedly held that insolvency was proper to be pleaded as a defense in proceedings for the collection of bonds. The case was not an irrigation district case but adopted the language of the *Kerr Glass* case, supra.

Appellants attempt to answer this trend of authority by saying that the cases above cited and contained in 12 Cal. (2d) still indicate that the rule of proration does not apply to irrigation districts. However, that contention is definitely and conclusively refuted in the case of *Provident Land Corp. v. Zumwalt,* 12 Cal. (2d) 365, at 377, where the Court stated:

> "If there is any doubt as to the propriety of this interpretation of the holding of that case (referring to Mulcahy v. Baldwin), it may be set at rest by an examination of our late decision in Kerr Glass Mfg. v. San Buenaventura—where

> we recognize the justice of applying equitable principles to the payment of bondholders in unusual circumstances, *notwithstanding the fact that express statutory provisions stood in the way.*"

Appellants point to language at page 374 indicating that the *surplus* funds should be paid "in the order of presentation". However, we wish to call this Court's attention to the fact that upon an application for a modification of the opinion as contained in 96 C. D. 497, counsel for some of the appellants herein sought to have the above quoted language and reference to the *Kerr Glass* decision stricken, which the Court declined to do, and the specific application and effort to remove that language from the *Zumwalt* case is found at pages 23-27 of the Irrigation Districts Association brief amicus curiae in *Bekins v. Lindsay-Strathmore,* No. 9206, in this Court, reference to which is specifically made.

The *Provident v. Zumwalt* case, supra, was an irrigation district case and it is submitted that the above quoted language is all significant of the attitude of the Supreme Court of California that proration would be ordered *despite statutory provision to the contrary in cases of insolvency.*

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4. REMEDY OF BONDHOLDER LIMITED TO PRORATION.

It is submitted that the cases definitely establish (*Mulcahy v. Baldwin,* 216 Cal. 517, at 525; *Moody v.*

Provident Irr. Dist., 12 Cal. (2d) 389); and it is admitted by the appellants, that the remedy of the bondholders is confined to mandamus, 1, to compel the levy of an assessment, and, 2, to compel disbursement of available funds.

If the remedy of the bondholder is limited to an equitable and prorata distribution of available funds, then that is the nature and extent of his right.

Mandamus in such a proceeding is definitely an equitable remedy and has been so held in California:

Bashore v. Sup. Ct., 152 Cal. 1 at 4;
Lukens v. Nye, 156 Cal. 498, at 506;
Hutchison v. Reclamation Dist., 81 Cal. App. 427 at 433;
Cal. Juris. Vol. 16, p. 769, Sec. 8;
Duncan Townsite Co. v. Lane, 245 U. S. 308, at 311; 62 Law Ed. 309 at 311;
U. S. ex rel. Arant v. Lane, 249 U. S. 367 at 371; 63 Law Ed. 650 at 652;
Morris, Mather Co. v. Port of Astoria, 15 Pac. (2d) 385;
City of Asbury Park v. Christmas, 78 Fed. (2d) 1003;
Commissioners v. City of Phil., 188 Atl. 314, at 316, 324 Pa. 129;
State v. City of St. Petersburg, 170 So. 730, 126 Fla. 233.

Having in mind the California Supreme Court's announcement in the *Kerr Glass* case and its specific language in *Provident v. Zumwalt*, 12 Cal. (2d) at

377, and referring to the language in *Blumenthal v. DiGiorgio Fruit Co.,* 30 Cal. App. (2d) 11, at 19, in an injunction case, where that Court, in quoting from the United States Supreme Court, said:

> "They are not entitled, as against their fellows who prefer to come under the plan and accepts its benefits, to force, at their own wish or whim, a liquidation which under the findings will not advantage them and may seriously injure those who accept the benefit of the plan".

We submit that the matter is beyond question that the attitude of the California Courts is contrary to the position taken by appellants.

That equitable relief will be granted as against the levy of high assessments and in order to accomplish proration of available funds is definitely established by the following cases:

City of Asbury Park v. Christmas, 78 Fed. (2d) 1003-4; *Commissioners of City of Phil.,* 188 Atl. 314 at 316; *State v. City of St. Petersburg,* 170 So. 730 at 731; *State v. Bay County,* 151 So. 10, 112 Fla. 687; *Cross Lake Club v. La.,* 224 U. S. 632; 56 Law Ed. 924; *State ex rel. Lawlor v. Knott,* 176 So. 113 at 114-119, 129 Fla. 136 at 138 to 151.

It has been definitely held that there is no lien or resulting trust in favor of the bondholders created by the issuance of the bonds. In *Clough v. Compton-Delevan,* 12 Cal. (2d) 385 at 388, the Court states:

> "There is, first, no lien or resulting trust arising from the purchase of the bonds. The Statute

fully defines the relationship of bondholders, district and landowners. Nowhere does it declare that the bondholder has a lien on the land itself and it certainly does not recognize any trust for his sole benefit."

Dated, San Francisco, California,
February 9, 1940.

Respectfully submitted,
On behalf of Irrigation Districts
Association of California:
Harry W. Horton,
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(Appendix Follows.)

Appendix.

POWER OF IRRIGATION DISTRICT TO SUE AND BE SUED.

Section 15b, of the California Irrigation District Act, with respect to the power to sue and be sued provides, among other things, as follows:

"The said board is hereby authorized and empowered to take conveyances, leases, contracts or other assurances for all property acquired by it under the provisions of this act, in the name of such irrigation district, to and for the uses and purposes herein expressed, and to institute and maintain any and all actions and proceedings, suits at law or in equity necessary or proper in order to fully carry out the provisions of this act, or to enforce, maintain, protect or preserve any and all rights, privileges and immunities created by this act, or acquired in pursuance thereof. And in all courts, actions, suits or proceedings, the said board may sue, appear and defend in person or by attorneys, and in the name of such irrigation district."

PROVISIONS OF CALIFORNIA IRRIGATION DISTRICT ACT AUTHORIZING AND PROVIDING FOR BOND FUNDING AND REFUNDING.

"Sec. 32a. The board of directors of any irrigation district organized under or subject to the provisions of this act may as hereinafter provided cause funding or refunding bonds to be issued for the purpose of funding or refunding any or all outstanding bonds

of the district. Such funding or refunding bonds shall, except as otherwise provided herein, be issued in substantially the manner and form prescribed by this act for the issuance of other bonds of irrigation districts, and the provisions of this act and of the act creating the California Districts Securities Commission concerning the authorization, certification, issuance and sale of bonds of irrigation districts shall be applicable to bonds issued under this section; provided, however, that no survey, examination, drawing, plan, estimate or report of the California Districts Security Commission as provided in sections 30, 30a, and 30b thereof shall be required to be made, nor shall any resolution of the board of directors that the proposed plan of works is satisfactory as prescribed by section 30b hereof be required to be adopted, but in lieu thereof the board of directors of any district desiring to fund or refund any of its bonds may submit to the California Districts Securities Commission its proposed plan for funding or refunding such bonds. The board of directors of any district may make such expenditures or, with the approval of the California Districts Securities Commission, may incur indebtedness, and issue warrants therefor, for the purpose of paying the cost and expenses incident to any such plan or any modification thereof approved in the manner hereinafter set forth or in connection with such funding or refunding. If such plan is approved by said commission, the board of directors of such district shall call an election for the purpose of authorizing the issuance of such funding or refunding bonds. Such

election shall be called and held and the result thereof determined and declared substantially in the same manner as provided by this act for the issuance of other bonds of such districts, except that a majority vote only shall be required for the authorization of such funding or refunding bonds. The maturity or maturities of said funding or refunding bonds shall be fixed by the board of directors of such district subject to the approval of the California Districts Securities Commission, but in no case shall the maturity of any of said bonds be more than fifty years from the date thereof. The rate of interest on such bonds shall not exceed six per centum per annum, payable semiannually.

When any district shall have submitted its proposed plan for funding or refunding such bonds to the California Districts Securities Commission, and as one of the terms or conditions of such plan, has reserved the right to modify such plan one or more times, and said commission shall have approved such plan, and when the board of directors of such district shall thereafter desire to modify such plan, such board of directors may submit the proposed modifications of such plan for approval to said California Districts Securities Commission. If such modifications of such plan are approved by said commission, the board of directors of such district shall call an election for the purpose of authorizing such modifications to such plan. Such election shall be called and held and the result thereof determined and declared substantially in the same manner as provided

by this act for the issuance of bonds of such districts, except that a majority vote only shall be required for the approval of such modifications.

Sec. 32b. Any issue of such funding or refunding bonds may, in the discretion of the board of directors, mature serially or at one time, but if any issue of such bonds shall mature at one time the board of directors prior to or at the time of the issuance of such bonds shall provide for the creation of an annual sinking fund for the payment of such bonds in such amounts as may be determined by the board of directors with the approval of the California Bond Certification Commission; and the board of directors, anything in this act to the contrary notwithstanding, shall each year at the same time and in the same manner as other assessments in the district are levied and collected, levy and collect an assessment upon all of the lands in the district, in addition to all other assessments in this act required or permitted to be levied and collected, sufficient to provide the amounts of such sinking fund payments for the then current year; provided that the amount of such sinking fund payments may be modified from time to time by the board of directors with the approval of the California Bond Certification Commission. Whenever such sinking fund shall contain at least ten thousand dollars, the board of directors shall by notice published at least once a week for three successive weeks in some newspaper published in the county where the office of the district is located, and, in its discretion, in any other newspaper or newspapers, invite sealed proposals for

the sale to the district of any of its outstanding funding or refunding bonds, for the payment of which such sinking fund was created. Said notice shall state the amount available for the redemption of such bonds and shall specify the time and place when such proposals will be opened. All such proposals shall be opened by the board of directors in open meeting at the time specified in said notice, or at some subsequent time to which such meeting shall be adjourned. Any or all of such proposals may be rejected, in the discretion of the board of directors. If no bids are received, or if the bids received and accepted are not sufficient to exhaust the moneys so on hand and available for the purpose, the board of directors may purchase at private sale with any available money in the sinking fund any of said bonds for the payment of which such sinking fund was created. No proposal to sell bonds to the district at a price in excess of the par value thereof shall be accepted. All bonds so purchased from sinking fund moneys shall be forthwith canceled. The board of directors may invest any money in the sinking fund in bonds of the United States or of the State of California, and shall hold the bonds so purchased together with the income therefrom, as part of the sinking fund until such time as the board of directors may determine that it is for the best interests of the district that such bonds or any of them be sold. The proceeds of sale of any bonds in which any part of said sinking fund shall be invested shall be deposited in the sinking fund.

The board of directors may, with the approval of the California Bond Certification Commission, by resolution adopted at or prior to the time of issuing any funding or refunding bonds, provide for the call and redemption of any of its funding or refunding bonds, in numerical order, or by lot, as may be prescribed in said resolution, on any interest payment date prior to their fixed maturity, at not exceeding the par value thereof and accrued interest, in which event a statement to that effect shall be set forth on the face of the bond. Notice of such redemption shall be published once a week for three successive weeks in a newspaper of general circulation printed and published within the county in which the office of the district is located. The first publication of such notice shall be not less than thirty days nor more than ninety days prior to the date fixed for such redemption. After the date fixed for such redemption if the district shall have provided funds available for the payment of the principal and interest of the bonds so called, interest on said bonds thereafter shall cease.

Notwithstanding anything to the contrary herein contained, the board of directors shall not be required to levy any such assessment for said sinking fund for said current year if the district shall have on hand surplus funds from other sources available for said sinking fund payment and shall have deposited the same in said sinking fund; and if the district shall have on hand funds available for the payment of a portion only of said sinking fund payment and shall have deposited the same in said sinking fund, said assessment for sinking fund purposes for such year

shall be so levied as to provide only for raising the amount by which the amount of such sinking fund payment shall exceed the amount deposited in said sinking fund, as aforesaid.

Sec. 32c. Any funding or refunding bonds herein provided for may be sold from time to time in the same manner as other bonds of the district, or, may be exchanged for such other bonds of the district upon such terms and conditions as may be approved by the California Bond Certification Commission. Any such outstanding bonds so funded or refunded or exchanged shall be immediately canceled by the treasurer.

Sec. 32d. Notwithstanding anything to the contrary in this act contained, if in the judgment of the board of directors it is desirable that the principal and/or interest of any funding or refunding bonds issued pursuant to this act, or any part of such principal or interest, shall be payable solely from the proceeds, or any part thereof, of any existing or proposed contract or contracts of the district for the sale of water and/or electricity, or otherwise, or from any other source or sources of payment, other than assessments, the board of directors may, with the approval of the California Districts Securities Commission so provide by resolution adopted at or prior to the time of the issuance of such bonds. In case the board of directors shall determine that the principal of any funding or refunding bonds issued pursuant to this act, or any part of such principal, shall be payable only from the proceeds of any such contract or

contracts or other source or sources of payment, other than assessments, it shall cause a brief statement of such limitations upon the payment of said principal, or portion thereof, to be set forth in such bonds; and in case such limitations shall affect the payment of the interest of such bonds or any part thereof, a statement of such limitations shall be set forth in the interest coupons representing such interest and also in the bonds to which such interest coupons are appurtenant. If such limitations shall affect the payment of a portion only of the interest which shall accrue on any funding or refunding bonds issued pursuant to this act, the board of directors may either provide that the entire installment of interest payable on any interest payment date shall be represented by a single coupon which shall contain a brief statement as to the portion of such interest, the payment of which is subject to such limitations, or, in its discretion, said board may provide that the portion of said interest the payment of which is not subject to such limitations and the portion of such interest the payment of which is subject to such limitations shall be represented by separate interest coupons, the coupons representing such portion of the interest as to which such limitations upon payment exist containing a brief statement of such limitations. In the event that the board of directors with the approval of the California Districts Securities Commission shall, pursuant to this act, provide that the principal and/or interest of any bonds, or any portion of such principal and/or interest, shall be payable solely from the

proceeds of any such contract or contracts, or other source or sources of payment, other than assessments, neither the district nor any officer thereof shall be holden for such payment otherwise.

Sec. 32e. Notwithstanding anything to the contrary in this act contained, the proceeds of any existing or proposed contract or contracts, or source or sources of payment, or any portion thereof, designated by said board, may by resolution of said board be allocated to the payment of the principal and/or interest of any bonds of the district, including funding or refunding bonds, or of any portion of such principal or interest designated by said board, and after such allocation and until the payment or retirement of the bonds for the benefit of which such allocation was made, such proceeds or other source or sources of payment, or portion thereof, so designated by said board, shall be applied solely to the payment of the obligation specified in such resolution. Such allocation may be made for the exclusive benefit of any one or more issues of bonds of the district, or portions thereof, designated in such resolutions, or, in the discretion of said board, for the benefit of any bonds of the district at any time issued or outstanding. Any such allocation shall be irrevocable until all of such bonds and their appurtenant coupons shall have been paid or retired.

The provisions of this section shall be applicable to any bonds issued by any irrigation district, whether for the purpose of the acquisition or construction of irrigation works or any other works authorized by

the provisions of this act, or any act amendatory hereof or supplemental hereto, or any funding or refunding bonds. Any such bonds may be made payable as to both principal and interest, either in whole or in part from the proceeds of any existing or proposed contract or contracts or source or sources of payment, or any portion thereof, designated by the board of directors, or said bonds may be payable from assessments upon the lands in the district as in this act otherwise provided, and the proceeds of any such existing or proposed contract or contracts or source or sources of payment or any portion thereof allocated to the payment of such bonds as additional security therefor. If any bonds, including refunding bonds, shall be hereafter issued by any district under or pursuant to the terms of this section and the board of directors of such district, with the approval of the California District Securities Commission shall provide that the principal and/or interest of said bonds, or any portion thereof, shall be payable solely and exclusively from the proceeds of any such contract or contracts or other source or sources of payment, then and under such circumstances neither the district nor any officer thereof shall be holden for such payment otherwise.

The district may also, with the approval of said commission, designate any bank or trust company or banks or trust companies to act as its agent or agents for the purpose of making payment of the principal and/or interest of any of its bonds, including its funding or refunding bonds, and/or receiv-

ing the payments under any contract or contracts for the sale of water or electricity or any revenue from any other source or sources, so allocated by said board to the payment of the principal and/or interest, or any part thereof, of any such bonds, and/or for the purpose of applying such payments to the payment of such principal or interest or portion thereof, so designated; and the district with the consent of said commission, may from time to time substitute another bank or trust company or other banks or trust companies in the place of the bank or trust company or banks or trust companies so designated and similarly may substitute another bank or trust company or other banks or trust companies in the place of any bank or trust company or banks or trust companies substituted as aforesaid.

Sec. 32½. Extension of bond maturities: Submission of issue to electors: Vote required to carry: Indorsement on bonds and coupons: Attachment of new coupons: Construction of section:

If the holder or holders of any outstanding bonds of an irrigation district, or warrants of such district payable at a stated time or times, shall agree in writing with the district that the time or times of maturity of such bonds or warrants may be extended and shall specify the proposed new date or dates of maturity of such bonds or warrants and the rate of interest which they will bear until the new date or dates of maturity, the board of directors of the district shall submit a copy of said agreement to the California District Securities Commission and if the com-

mission shall approve the agreement, the board of directors shall call a special election at which there shall be submitted to the qualified electors of the district the question whether or not the maturity of the bonds or warrants specified in the agreement shall be extended as provided therein and with such rate or rates of interest payable semiannually as is provided in said agreement. Notice of said election shall be given and it shall be held and the result thereof declared as in the case of an election for the authorization of bonds, except that if a majority of the votes cast for and against the proposition shall be in favor of extending the maturities of the bonds or warrants, the proposition shall be declared carried, and upon the presentation of the bonds or warrants specified in the agreement, or any of them, to the secretary of the district, he shall endorse the date thereon to which the maturity thereof is extended and shall attach to the bonds or warrants coupons with his signature, or a facsimile thereof, to evidence the semi-annual interest from the time or times of the original maturity of the bonds or warrants to the new date or dates thereof, and each bond or warrant so presented and endorsed shall continue as an obligation of the district and shall not become due until the date specified therefor in said agreement. If the agreement shall have provided for a reduction in the rate of interest on said bonds or warrants before the original time or times of maturity thereof, new coupons signed as aforesaid shall be attached to said bonds or warrants to evidence the reduced interest and any old coupons

evidencing the interest as originally provided for shall be detached by the secretary from said bonds or warrants and canceled. All interest coupons shall be payable on the first day of January or the first day of July of each year for which they are issued, and the rate of interest specified in said agreement shall not exceed six per cent (6%) per annum. If any district shall have proposed a plan of composition of its outstanding indebtedness and said plan shall involve the extension of the time of the maturity of all or any of its outstanding bonds or warrants or any reduction in the rate of interest borne by such bonds or warrants and said plan shall have been accepted by the holders of at least two-thirds in amount of the bonds or warrants affected thereby and shall have been approved by the California District Securities Commission, the board of directors of the district may call an election as herein provided to determine whether or not the time or times of such maturity of such bonds or warrants may be extended as provided in said plan.

Construction of section. This section shall not be construed to amend, modify or limit any other provision of law for changing the date or dates of maturity of outstanding obligations of a district, but shall be construed as providing for an alternative method of extending the life of any obligations whose date or dates of maturity may be changed under any other provision of law.

PROVISIONS OF CALIFORNIA LAW AUTHORIZING BORROWING OF MONEY FROM FEDERAL GOVERNMENT. (Act 3873, Deering's G. L.)

Section 1. In addition to the powers with which irrigation districts have been vested under the act approved March 31, 1897, designated the California Irrigation District Act, and acts amendatory thereof or supplementary thereto, and acts of or to which said act is amendatory or supplementary, irrigation districts heretofore or hereafter organized under said acts shall have the following powers: To cooperate and contract with the United States under the Federal Reclamation Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto, or any other act of Congress heretofore or hereafter enacted authorizing or permitting such cooperation, for the purposes of construction of works, whether for irrigation or drainage, or the development and distribution of electrical energy or any or all of said purposes, or for the acquisition, purchase, extension, operation or maintenance of constructed works, or for a water supply, or for the assumption as principal or guarantor of indebtedness to the United States on account of district lands; *also to borrow or procure money from the United States or any agency thereof for the purpose of financing any of the operations of the district or for the purpose of financing or refinancing the obligations of the district, including any outstanding warrants or any other indebtedness, or for the funding or refunding or purchase of the bonds of the district or for any of the purposes of the district authorized by law.* (Emphasis ours.)

PRESENTATION, ENDORSEMENT, AND PAYMENT OF IRRIGATION DISTRICT BONDS AND INTEREST COUPONS.

Sec. 52 of the California Irrigation District Act provides:

"Upon presentation of any matured bond of the district, the treasurer shall pay the same from the bond principal fund, and upon presentation of any matured interest coupon of any bond of the district, the treasurer shall pay the same from the bond interest fund; provided, however, that if any refunding plan adopted under the provisions of section 32a of this act, or any modification thereof adopted as in this act provided, shall designate a special fund for the payment of bond principal or interest or sinking fund, the same shall be payable out of such fund or funds designated in such refunding plan or modification thereof; and provided further, that to the extent any such fund contains money applicable to the sinking fund provided for in such refunding plan or modification, it shall be the duty of the treasurer of the district to withdraw such sinking fund moneys from such fund to the amount and at the times required under the terms of such refunding plan or modification thereof and to apply the same as in such refunding plan or modification thereof provided. If money is not available in the fund designated for the payment of any such matured bond or interest coupon, it shall draw interest at the rate of seven per cent per annum from the date of its presentation for payment until notice is given that funds are available for its payment, and it shall be stamped and provision made for its payment as in the case of a warrant for the pay-

ment of which funds are not available on its presentation * * *''

Sec. 61a of the California Irrigation District Act provides:

''Whenever any warrant of the district payable on demand is presented to the treasurer for payment when funds are not available for the payment thereof, it shall thereafter draw interest at a rate to be determined by resolution of the board of directors, not, however, to exceed seven per centum per annum, until public notice is given that such funds are available. Upon the presentation of any such warrants for payment, other than warrants issued under the provisions of section 61 hereof, when funds of the district are not available to pay the same, the treasurer of the district shall endorse thereon the words ''funds not available for payment'', with the date of presentation and shall specify the interest that such warrants shall thereafter bear and shall sign his name thereto. He shall keep a record showing the number and amount of each such warrant, the date of its issuance, the person in whose favor it was issued, and the date of its presentation for payment. Whenever there is sufficient money in the treasury to pay all such outstanding warrants or whenever the board of directors shall order that all such warrants presented for payment prior to a certain date, be made and there is sufficient money available for such payments, the treasurer shall give notice in some newspaper published in the district, or, if none is published therein, then in some newspaper published in the county in which the district or any portion thereof is situated,

or, if none is published in such county, then the treasurer shall post such notice conspicuously in the place in which the board of directors of the district holds its regular meetings, stating that he is prepared to pay all warrants of the district for the payment of which funds were not available upon their original presentation, or all such warrants which were presented for payment prior to the date fixed by the board of directors, as the case may be, and no further description of the warrants entitled to payment shall be made in such notice. Upon the presentation of any warrant entitled to payment under the terms of such notice, the treasurer shall pay it, together with interest thereon at the rate specified by the board of directors, from the date of its original presentation for payment to the date of the first publication or posting of said notice, and all warrants for the payment of which funds are declared in said notice to be available shall cease to draw interest at the time of the first publication or posting of said notice. The treasurer shall enter in the record hereinbefore required to be kept, the dates of the payment of all such warrants, the names of the persons to whom payments are made and the amount paid to each person. * * *"

No. 9133

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

/0

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation), *Appellants*, vs. PALO VERDE IRRIGATION DISTRICT (an irrigation district), *Appellee.*	}

APPELLANTS' PETITION FOR A REHEARING.

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FILED
OCT 4 - 1940
PAUL P. O'BRIEN,

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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IN THE

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JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation), *Appellants,* vs. PALO VERDE IRRIGATION DISTRICT (an irrigation district), *Appellee.*	}

APPELLANTS' PETITION FOR A REHEARING.

To the United States Circuit Court of Appeals for the Ninth Circuit, the Honorable William Denman, Clifton Mathews, and Albert Lee Stephens, Judges, Presiding:

Come now, James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin, a corporation, Appellants herein, and respectfully petition this Honorable Court for a rehearing in the above entitled cause, and for grounds of said petition, show:

I.

ALL PROPOSITIONS ARGUED BY APPELLANTS WERE PRESENTED TO THE TRIAL COURT.

This Court states at page 3 of its opinion that Propositions 4, 6, 7, 8, 9, 10, 11, 12, and 13 were not urged in the trial Court. This whole case has been tried twice before. The first trial had been before Judge Cosgrave and lengthy arguments had been made to that Judge and voluminous briefs were filed, so that when the second trial under the new bankruptcy act came up counsel considered that Judge Cosgrave was sufficiently familiar with the record and the arguments of counsel, so that Appellants did not wish to unduly encroach upon the patience of the Court and orally presented but the three points, whereupon Judge Cosgrave stated that he did not desire to hear arguments upon other points. The objections, however, appear in the record as we will now proceed to show.

Proposition 4 was presented by the answer (R. 60-62). Proposition 6 is presented by the answer (R. 63). As to Proposition 7, the answer twice denies that the plan of composition is fair or equitable or for the best interests of creditors, and alleges discrimination in favor of the R.F.C. (R. 61, 64). Proposition No. 11 was brought to the Court's attention by the separate defenses in the answer (R. 66). As to Proposition 13 it is specifically alleged in the answer (R. 67) that the State of California cannot consent and that its consent is unconstitutional (and it may be pointed out not only

for the violation of the contract clause, but the violation of Article IV, Section 1, Article X, Section 5, and Article XIII, Section 6 of the State Constitution, and as to these objections this Court nowhere comments in any of its opinions).

Proposition 9 is specifically raised as a defense in the answer at R. 67. Proposition 10, as to taking of trust funds, was pleaded indirectly through pleading violation of the Fifth Amendment to the United States Constitution and that the plan was inequitable. Furthermore it was pointed out that the statute itself requires the trial Court to make certain definite findings and it would not seem that it would be incumbent upon a creditor in a bankruptcy proceeding to make any pleading or representation with respect to such obligatory findings such as that the plan is fair or that the district is not authorized by law to carry it out. The material allegations of the petition with respect to these requisite findings are denied by the Appellants in their answer. Furthermore the case was tried upon the entire theory of these objections, including the question of whether the district was authorized by law to carry out the plan. This objection related not to the question of state consent, but the question of statutory authority of the district to perfect the plan.

II.

JURISDICTION.

Appellants urge that the Court was without jurisdiction to entertain the petition and in that behalf rely upon the arguments of Appellants in the Merced case in their petition for rehearing heretofore filed.

III.

RES JUDICATA.

Appellants refer to the argument of the Appellants in the Lindsay-Strathmore Irrigation District and Merced Irrigation District cases in the petitions for rehearing and reply upon the arguments there presented, but further call attention to the particular circumstances of the instant case. It will be recalled that Appellants pleaded at R. 65 that the judgment became final, that is the judgment of the District Court under Section 80, and that by force and effect thereof all of the matters set forth in the present petition are *res judicata.* Under the authority of the important and controlling case of *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 60 S. Ct. 317 and the case of *Stoll v. Gottlieb,* 305 U.S. 165, it must be considered that the Court had jurisdiction to enter its judgment and thereby to determine all possible issues. Among these issues is the issue of unconstitutionality. This is specifically set forth in the record at R. 298. At this same page in the record it is shown that the first bankruptcy case came on for

trial and was heard by the Court and tried **on the merits,** and on December 8, 1936, Judge Cosgrave entered a judgment of dismissal. This Court's statement at page 9 of the Merced decision that "no reasons are given" for the decision, or that the decision is not *res judicata* of any rule of law, simply does not apply in this case. The Merced opinion is not in point. The judgment of dismissal was specifically made on the grounds of unconstitutionality, and under the authority of the cases we have cited it is also *res judicata* of the merits of the plan.

IV.

THE EFFECT OF THE PRIOR CONSENT.

As this Court has noted at page two of its opinion, argument was addressed to the District Court on the proposition of the plan having been carried out out of Court. Now the R.F.C. (R. 150, 328) filed a written consent to the plan of composition which was filed under the State Court proceedings under the provisions of Cal. Stats. 1927, Chapter 24. This Court nowhere in its opinion comments upon the effect of Section 19 of that statute, which provides that if the petition is dismissed the dismissal "shall not affect the effectiveness of the plan with respect to the district or holders of bonds or warrants, accepting the same". It is our contention which has not been met by this Court that this acceptance constituted a **contract** under that statute of the State of California and that

the R.F.C. is consequently bound thereby as a matter of law and that its consent therefore cannot be counted in this case, and that the plan has therefore already been carried into effect so far as the bonds held by the R.F.C. are concerned.

V.

THE DISTRICT IS NOT AUTHORIZED BY LAW TO CARRY OUT THE PLAN.

Chapter IX of the Bankruptcy Act requires the trial Court to make a finding on this question. In the Bekins case the Supreme Court said that this requirement refers to local law. The Court has not commented upon the following points:

1. The authority of the R.F.C. to loan expired in 1936. Title 15, Sec. 504(a) U.S.C. provides that no funds shall be disbursed on any commitment to make a loan made by the R.F.C. "after the expiration of one year from the date of such commitment or agreement".

2. There was no approval of the Districts Securities Commission of the plan adopted May 10, 1938.

3. The plan of composition of May 10, 1938, is not shown to be authorized by the Board of Trustees of the district (R. 12, 21).

VI.

THE R.F.C. QUESTION.

Reference is made to the arguments of the Appellants in the Merced Irrigation District case and in the Lindsay-Strathmore Irrigation District case which arguments are set forth in the petitions for rehearing in those cases and are hereby adopted and referred to.

VII.

TRUST PROPERTY.

The Court erred in holding that Section 29 of the California Irrigation District Act does not create a trust of which bondholders are beneficiaries.

The citation of the case of *Clough v. Compton-Delevan Irrigation District,* 96 C. D. 509, 86 Pac. (2d) 126, 128, was perhaps unfortunate because the Court was there discussing primarily whether or not the bondholders' payment of money to the district created a resulting trust and the Supreme Court correctly held it did not.

However, in *McKaig v. Moutrey,* 90 Pac. (2d) 108, 32 Cal. App. (2d) 537, decided by the Third District Court of Appeal several months after the *Compton-Delevan* case that Court said:

> "The assessments levied created liens on the land and a trust in favor of the bondholders.",

and in the case of *Provident Land Corporation v. Zumwalt,* 94 Pac. (2d) 83, 99 C. A. D. 1, decided with

the *Compton-Delevan* case, the Court seems to Appellants definitely to hold that there is a trust in favor of the bondholders. The Court says:

> "In our opinion, the statute was intended to secure the bonds by the proceeds of the land in the district. It is true that the bonds themselves are not a lien on the land. But the assessment is a lien (Sec. 40), * * *"

The Court also says, discussing Section 29:

> "* * * the lands remain in trust, and the district exercises its powers, however broad, as a trustee.",

going on to hold that the proceeds follow the trust, and then discussing whether or not "payment of the bondholders is one of these purposes", that is one of the purposes of the trust, says:

> "Among other purposes of the act, therefore, is the repayment of the bondholders of the district, and it follows that this is one of the purposes for which the trust money is held * * * The land is the ultimate and only source of payment of the bonds. It can never be permanently released from the obligation of the bonds until they are paid."

Appellants suggest that the analysis of the trust relation in the Merced case is erroneous.

VIII.

50 CENTS PAID SOME, 23.248 CENTS OTHERS.

Appellants point out an error in the Court's statement where the Court says that the plan provided 24.81 cents for all the bondholders. It is true that the plan set forth at R. 21 appears so to provide. But the bondholders did not receive 24.81 cents. As Appellants pointed out in their opening brief at page 93, the record bears this statement out quite amply at R. 223. L. R. Hauser, vice-president of the district testified that it was arranged that the Mutual Water Company bondholders should receive 50 cents on the dollar for their bonds and that the holders of the bonds of the other three districts should give up the difference so that they should actually receive not 24.81 cents, but 23.248 cents per dollar. And see R. 181 where this is further explained. The R.F.C. refused to make that modification, but nevertheless it was carried out. See also R. 242 and R. 337 where some of the Appellants requested a modification of the plan to allow them the same 50 cents that had been paid to the Mutual Water Company bondholders. This discrimination is contra to the plan and unjust.

IX.

FAIRNESS OF THE PLAN.

The plan as judged by the *Los Angeles Lumber Products* case is grossly unfair.

1. The district, since it entered into the arrangements with the R.F.C., has been able to build up what amounts to a surplus cash fund of over $100,000.00.

The assessed value of the land itself was $5,000,000.00 in 1927 and approximately $3,000,000.00 in 1937 (R. 258).

The R.F.C. appraiser appraised the value at $70.00 to $80.00 an acre (R. 295). This relates to 30,000 acres of land which alone would be therefore valued at $2,250,000.00.

It is quite clear that inasmuch as a loan by the R.F.C. was obviously a bankers loan, and undoubtedly based upon not over 50% of the value of the probable assets, and as under the provisions of California law relating to issuance of bond, bonds cannot exceed 60% of the value of the bare lands, water rights, canals and other properties of the district, someone gets the beneficial interest.

Inasmuch as 99.66% of the land was owned by the district it seems to Appellants to be a great injustice that this beneficial interest should be taken from them and given to others. It certainly does not seem that it was intended by this procedure to take the property and assets of the bondholders and to give a portion thereof to individuals who are not even interested parties in the bankrupt concern. If the plan of com-

position had provided that the bondholders would get the money from the R.F.C. and all the lands in addition the plan would have been fair, but it cannot be fair if tested by the *Los Angeles Lumber Products* case when one dollar of value is given to any prospective or past landowner.

Mr. Williams (R. 187) said that after refinancing the district proposes to sell the land back to the former owners. This has been done. In the case of *Kaufman County Improvement District No. 4, Bankrupt,* ...... Fed. Sup. ...., decided July 22, 1940, where the District Court in Texas (Judge W. A. Atwell) dismissed the plan of composition under this act as unfair and discriminatory, the Court said:

> "It does discriminate. That is the purpose of it. That is the reason they went this route. There is little use to talk about that. It is apparent on its face; they thought if they did nothing and paid nothing and let it go to weeds and grass, then they could buy it in and do what they pleased with it, and I am not going to approve it."

And referring to the payment of taxes the Court said that while there may have been some assessments from 1930 to 1940, the assessments have not been paid and the judge finds that the "discontinuance has been practically unanimous" and that "there was a concert of action in that direction". He also finds that the land in its present condition is of practically no value. This decision has not yet been reported but will shortly be reported in Federal Supplement, but at any rate that is about the situation in the *Palo Verde* case.

Judge McCormick remarked in one of his decisions, that the benefits and increased values to the district have resulted in quite a degree from the R.F.C. refinancing. It is the Appellants' contention that whatever that benefit is it should redound to the benefit of the creditors and not to the benefit of the beneficial or equitable owners of the assets.

We cite the case of *Burough of Fort Lee v. U. S.,* 104 Fed. (2d) 275, as authority for the proposition that the issuance of the writ of mandate constitutes a vested right. We refer to the writ of mandate which the Court says was merely an ex parte order and which impounded approximately $100,000.00 of district funds for the Appellants (R. 304).

Lastly, on fairness, there is the matter of interest paid the R.F.C.

In conclusion we respectfully refer to the arguments presented in the other petitions for rehearing in the companion cases, involving the Corcoran, Merced, Lindsay-Strathmore, and James Irrigation District cases. We also refer to the points and arguments made in our opening and closing briefs and upon oral argument, and we respectfully urge that a rehearing be granted and the decree reversed.

It is respectfully suggested to this Court that in the event a rehearing is denied in the Merced case that inasmuch as the appellants in that case, or the majority of them, intend to apply to the United States

Supreme Court for a writ of certiorari in that case, that denial of the petition for rehearing herein might appropriately be withheld until final action has been taken in the Merced case. We do not suggest, however, that an order granting a rehearing should be withheld.

Dated, Turlock, California,
October 4, 1940.

Respectfully submitted,
W. COBURN COOK,
CHAS. L. CHILDERS,
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for the appellants and petitioners in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Turlock, California,
October 4, 1940.

W. COBURN COOK,
CHAS. L. CHILDERS,
Counsel for Appellants and Petitioners.

No. 9480

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRANCIS A. HOWARD,

Appellant,

vs.

E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., a corporation, HOWARD F. ZAHNO, also known as FRANCIS Z. HOWARD, JAMES H. MOYER, MARY M. VAUGHAN, JAMES WESTERVELT, CHARLES S. MACKENZIE, THOMAS MIDGLEY, Jr., JAMES I. BOWERS, M. J. CRONIN and CHARLES LEVY,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

FILED

PAUL P. O'BRIEN,

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9480

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRANCIS A. HOWARD,

Appellant,

vs.

E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., a corporation, HOWARD F. ZAHNO, also known as FRANCIS Z. HOWARD, JAMES H. MOYER, MARY M. VAUGHAN, JAMES WESTERVELT, CHARLES S. MACKENZIE, THOMAS MIDGLEY, Jr., JAMES I. BOWERS, M. J. CRONIN and CHARLES LEVY,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

PARKER PRINTING COMPANY. 545 SANSOME STREET. SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
Southern District of California
Central Division

Civil Action No. 634 Y Civil

FRANCIS A. HOWARD,

Complainant,

vs.

E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., a corporation, HOWARD F. ZAHNO, also known as FRANCIS Z. HOWARD, JAMES H. MOYER, MARY M. VAUGHAN, JAMES WESTERVELT, CHARLES S. MACKENZIE, THOMAS MIDGLEY, Jr., JAMES I. BOWERS, M. J. CRONIN, and CHARLES LEVY, and fictitious named defendants,

Defendants.

BILL OF COMPLAINT IN EQUITY FOR INVALIDATION OF PATENT, INVALIDATION OF UNCONSTITUTIONAL CONTRACTS, CONSPIRACY AND FRAUD, ETC.

Come now, Francis A. Howard and complains against the defendants and each of them for a cause of action as set forth in this bill of complaint in equity, as follows, to wit:

I.

That the complainant, Francis A. Howard, 342 Wilcox Building, Los Angeles, California, is a citizen of the United States of America.

II.

That the defendants are E. H. Archer, Long Beach, California, The Howard-Vaughan Co., Inc., a corporation, organized under the laws of the State of New York, with offices at 407 Sixth Street, Niagara Falls, New York, Howard F. Zahno also known as Francis Z. Howard, 2129 North Avenue, Niagara Falls, New York, James H. Moyer, 1825 Weston Avenue, Niagara Falls, New York, Mary M. Vaughan, 407 Sixth Street, Niagara Falls, New York, James Westervelt, 343 Twenty-first Place, Santa Monica, California, Charles S. MacKenzie, Room 2555, 120 Broadway, New York, Thomas Midgley, Jr., Dayton, Ohio, James I. Bowers, Somerville, New Jersey, [2] M. J. Cronin, 921 Bergen Avenue, Jersey City, New Jersey, Charles Levy, 18 East 41st Street, New York, New York, and fictitious named defendants, Does 1 to 25; John Does 1 to 25; Jane Does 1 to 25; Roe Corporation, a corporation, 1 to 25; Doe Corporation, a corporation, 1 to 25; Roe and Doe Corporations, corporations 1 to 50; A. Black and B. White, co-partners, doing business under the co-partnership name and style, and firm name of Black and White, 1 to 25; co-partnerships doing business as co-partnerships and partners under various names and

styles as firm names, 1 to 50; the said fictitious named defendants' correct names and addresses are unknown at this time and as soon as said fictitious names and addresses are correctly known, complainant will respectfully beg leave of the court to amend this bill of complaint in equity and insert the true and correct names and addresses of said fictitious named defendants.

III.

Complainant avers that for the jurisdiction of this bill of complaint in equity, that the defendants and each of them have caused and have further threatened irreparable losses, injuries and damages in excess of and over Three Thousand ($3,000.00) Dollars over and above all costs and attorney fees in the prosecution of this action and that a federal question is involved in the matter of a patent and all rights in connection thereto, belonging to complainant, of which said rights complainant has been unlawfully deprived, and complainant has also been deprived of his constitutional rights unlawfully and rights under the federal laws of the United States of America as hereinafter set forth in this bill of complaint in equity.

IV.

Complainant further avers that he has always at all times and is now the President and a Director of the Board of Directors in the aforesaid Howard-Vaughan Co., Inc., a corporation. [3]

V.

Complainant, Francis A. Howard avers, that during the year 1915 or the early part of the year 1916, that complainant discovered that tetraethyl lead, when mixed in small quantities with any grade of gasoline, increased the efficiency of such gasoline when used as fuel for internal combustion engines, eliminated the knock in the motor and minimized the accumulation of carbon in the cylinders of the motor which occurred in the use of gasoline not so treated, and further discovered that tetraethyl lead when mixed with certain other chemicals or reagents in relatively certain quantities and under relatively certain conditions made a safe, efficient and cheap chemical compound, which, when added to any grade of gasoline, increased its efficiency when used as fuel for internal combustion engines, eliminated the knock in the motor and minimized the accumulation of carbon in the cylinders which attended the use as motor fuel of gasoline not so treated.

VI.

Complainant further avers, that said complainant Francis A. Howard wrote out a formula in conformity with his said discoveries. In addition to tetraethyl lead, the chief active ingredient or reagent employed in accomplishing the beneficial results as recited in paragraph 5 hereof, said formula contained several other ingredients or reagents some of which were for the purpose of preventing precipitation, enabling the tetraethyl

lead to act more efficiently and to bring about other beneficial results; some of which were intended to give to low grade gasolines an increased explosive force; one of which was for the sole purpose of giving to the mixture of said chemical compounds and to the gasoline impregnated with it, a distinctive color and some other of said ingredients were employed for the sole purpose of concealing the presence in said mixture of tetraethyl lead and other ingredients, without interfering with the effectiveness thereof [4] and to render impossible, complete analysis of said mixture of chemical compounds composing said formula and to prevent anyone from ascertaining by analysis that it contained tetraethyl lead.

VII.

Complainant further avers, that the said complainant Francis A. Howard, on or about the same time of making the aforesaid discovery that complainant invented a process and method of mixing said chemical combination, which rendered said mixing and mixture safe and aided the assimilation of the tetraethyl lead by the gasoline with which it was blended and made its reaction more potent in accomplishing the results hereinbefore described. That said formula is a SECRET FORMULA, and to the chemical compound made pursuant to it was given the name of "Vitigas" and under that name it was marketed and sold by complainant for several years thereafter.

VIII.

Complainant further avers, that on or about November 4, 1916, an application for registration of a certain trademark covering the use of the word "Vitigas" was filed in the United States Patent Office in the name of Howard-Vaughan corporation aforesaid Serial No. 99086, and said trademark, covering and giving to complainant the exclusive right to the use of the name "Vitigas" was duly registered in said United States Patent Office on the 24th day of April, 1917, and, further, that on November 25th, 1916, Complainant deposited in the United States Patent Office for registration a label, of which the following is the title: "Garage Vitigas" (for a chemical compound for use in gasoline), and the name was duly issued to said corporation by the Commissioner of Patents on the 13th day of February, 1917, as No. 19885; and further avers that on each and every package of aforesaid mixture of chemical compounds thereafter sold by complainant and said corporation, a label was attached bearing a facsimile of the label deposited as aforesaid for registration, so that the [5] public could always identify the goods manufactured and sold by complainant and said corporation and called "Vitigas", and distinguish the said product "Vitigas" from any other product purporting to accomplish the same or a like purpose as "Vitigas." The containers of said "Vitigas" so sold also contained thereon the directions for its use; and complainant further avers that the

registration of the said trademark "Vitigas" and said label was duly published as required by law.

IX.

Complainant further avers, that on January 25th, 1918, said complainant Francis A. Howard filed in the Office of Commissioner of Patents an application for Letters Patent of the United States on a "Process for the Extraction of Gasoline and Another Product From Kerosene", Serial No. 213,698, and said process patent was ultimately issued by the Commissioner of Patents on November 12th, 1918, as United States Letters Patent No. 1,284,687, containing four claims; and complainant further avers that the said PROCESS PATENT No. 1,284,687, provided a *a* means for recovering certain hydrocarbon distillates which were used as reagents in conjunction with, and to further and expedite the assimilation of certain other ingredients or reagents and lead compounds which composed the aforesaid secret formula for "Vitigas".

X.

Complainant further avers, that the defendant Thomas Midgley, Jr., fraudulently, wrongfully and unlawfully filed numerous applications to the Commissioner of Patents of the United States Patent Office for patent for various and sundry chemical compounds which contained one or more of the ingredients or chemical reagents which were contained in aforesaid secret formula of complainant

and which said defendant Thomas Midgley, Jr., knew were contained in said secret formula of complainant which was used for the production of "Vitigas" and said defendant [6] Thomas Midgley, Jr., falsely represented to said Commissioner of Patents of the Patent Office of the United States, that said chemical compounds and each of them was and were new and useful discoveries and inventions of said defendant Thomas Midgley, Jr., and thereby practiced fraud upon the said Patent Office of the United States and through and by said fraud executed by the said defendant defrauded complainant of his property and property rights; when the said defendant Thomas Midgley, Jr., well knew that none of said claims as made by said defendant for which applications for patents were made, as aforesaid, and on which applications were made for said patents and said patents were subsequently issued, by said defendant falsely stating that the discoveries by him was and were useful or could produce the results which said defendant Thomas Midgley, Jr., claimed in his said applications, when as a matter of fact, that none of the said claims for a patent by the said defendant Thomas Midgley, Jr., represented a discovery or invention by said defendant Thomas Midgley, Jr., because the said defendant Thomas Midgley, Jr., with malicious aforethought, conniving and scheming, gained entrance to the laboratory of complainant and deliberately and wilfully stole the information relative to the claims he made in applying for said

patents, and thereby had patents issued to him, through and by his practice of fraud upon the Patent Office of the United States and thereby defrauded complainant, and among the patents so applied for by the said defendant, Thomas Midgley, Jr., to the said Patent Office of the United States, were patents as follows: Application for patent on January 7th, 1918, which patent was granted as No. 1,296,832 issued March 11th, 1919, in which said patent he made the principal claim which was for benzol blended with Kerosene as an anti-knock preventer to be mixed with gasoline for use as a fuel for internal combustion engines; and another of said patents [7] so applied for on October 4th, 1918, which was issued was No. 1,491,998 issued April 29th, 1924, in which the principal claim was for benzine mixed with cyclohexane as a motor fuel; and another of said patents so applied for on October 15th, 1920, and which was issued was No. 1,-501,568 issued July 15th, 1924, in which the principal claim was for aniline injection as an anti-knock resisting fluid; and on April 15th, 1922, filed an application for Letters Patent for what he wrongfully described as "Method and means for using motor fuels", for the first time set forth in the twenty-first claim, "A fuel for internal combustion engines comprising gasoline and tetraethyl lead", and patent thereon was issued to said defendant, Thomas Midgley, Jr., on February 23rd, 1926, as No. 1,573,846, and the said defendant, Thomas Midgley, Jr., very well knew that when he

filed said application for said patent and executed the inventor's oath provided by law, the said defendant knew that aforesaid complainant for many years before had used tetraethyl lead in the secret formula of said complainant for Vitigas as the chief and principal ingredient or reagent which when blended with gasoline and kerosene to stop the knock in motors, and the said defendant Thomas Midgley, Jr., practiced fraud upon the Patent Office of the United States and perjured himself when he filed applications for patents as the discoverer and inventor as set forth herein, and thereby by fraud and perjury deprived complainant of his property and property rights without jurisdiction and without due process of law.

XI.

That on or about January 15th, 1938, the defendants E. H. Archer and James Westervelt entered into a conspiracy and conspired with each other, and have continuously conspired up to and including the present time for the purpose of defrauding complainant of his property and property rights without [8] due process of law.

XII.

Complainant further avers, that the defendants, Howard-Vaughan Co., Inc., corporation, Howard F. Zahno also known as Francis Z. Howard, James H. Moyer and Mary M. Vaughan, directors of said corporation, and defendant James Westervelt, con-

spired in a conspiracy to defraud complainant and defendant Charles S. MacKenzie also conspired in a conspiracy with said defendants as hereinafter set forth for the purpose of defrauding complainant, by holding numerous and various directors meetings of said corporation, and did not notify complainant that said meetings were to be held, disregarding the fact that complainant Francis A. Howard was at all times and is now a President and Director in said corporation, and said meetings of the said directors of said corporation were held at Niagara Falls, New York, on dates as follows: December 15th, 1937; December 28th, 1937; January 10th, 1938; February 4th and February 17th, 1938; March 16th, 1938; and on or about during the month of February, 1939, and the said meetings were all held purposely by the said defendants for the purpose of making a fraudulent buildup to defraud complainant of his property and property rights in the execution of said conspiracy and fraud, thereby defrauding complainant without due process of law of his constitutional rights which is accorded to complainant as an inventor in the discovery of scientific and useful arts in the United States of America under the citizenship of said complainant as an American citizen of the United States.

XIII.

Complainant further avers, that on or about December 15th, 1937, the defendants Zahno also known as Francis Z. Howard, James H. Moyer, and Mary

M. Vaughan, as directors of aforesaid defendant Howard-Vaughan Co., Inc., a corporation, and James Westervelt, defendant herein, conspired in a conspiracy, and notified complain- [9] ant that a directors meeting of said corporation to be held on December 15th, 1937, and when complainant arrived at the place in Niagara Falls, New York, where said directors meeting was to be held, the said defendant James Westervelt advised the said directors not to hold any meeting and would not allow the said directors hold any meeting, and the said directors did not hold any meeting, but regardless of this fact, sometime after there was placed on the minute book of said corporation a set of minutes as of a directors meeting having been held on the said date of December 15th, 1937, and through and by the conspiracy and fraud of said defendants relative to said directors meeting, complainant was denied the right to sit in a meeting and was not notified of the meeting that purportedly took place on December 15th, 1937, in the fraudulent manner as herein described, which said conspiracy and fraud was perpetrated against complainant for the purpose to defraud complainant of his property and property rights and the said defendants have defrauded complainant of his property and property rights through and by conspiracy and fraud without due process of law, by the said fraudulent meeting of the said directors as herein set forth.

XIV.

Complainant further avers, that on or about December 28th, 1937, the defendants Howard F. Zahno also known as Francis Z. Howard, James H. Moyer and Mary M. Vaughan, directors in said corporation Howard-Vaughan Co., Inc., and as directors of said corporation, held a directors meeting at Niagara Falls, N. Y., without notifying complainant, and a letter from defendant James Westervelt dated December 24th, 1937, was read and said letter referred to a contract dated October 2, 1936, wherein one Fred E. Stivers (deceased December 7, 1937) and James Westervelt, attorneys-at-law, said contract retaining said Stivers and Westervelt to act as counsel in all matters for said Howard-[10] Vaughan Co., Inc., a corporation, in connection with other certain matters, and the said contract dated October 2, 1936, was procured by misrepresentation and fraud from complainant as President of said corporation, by the said Stivers and Westervelt, and said contract was at no time approved or authorized or adopted by the directors of said corporation, but however a fraudulent attempt was made to approve said contract by the said defendant directors of said defendant corporation, and said defendant James Westervelt, and said defendant directors of said corporation, entered into a conspiracy and conspired against the complainant hereof, and the said defendant Westervelt and said defendant directors held the said directors meeting of December 28th, 1937, without

notifying complainant, and in the said fraudulent directors meeting fraudulently attempted to approve the said contract dated October 2, 1936, and thereby defraud complainant through and by the conspiracy herein set forth for the purpose of fraud and deprive complainant of his property and property rights consisting of such rights as granted by the United States of America, as herein set forth in this bill of complaint in equity and defraud complainant of his patent, patent rights, and secret formula and secret formula rights for a chemical compound for use in gasoline, and thereby defraud complainant without jurisdiction and without due process of law, and also defraud complainant further by and through the participation of defendant Charles S. MacKenzie with said defendant James Westervelt in said conspiracy and fraud practiced by said defendants against complainant as herein set forth which has been also participated in by the directors of said corporation to deprive complainant of his patent and patent rights and secret formula and secret formula rights such as have been granted to complainant by the United States of America for the purpose of the progress of science and art as discovered and invented by complainant, which carry no provision for such fraud as has been practiced against complainant. [11]

XV.

Complainant further avers, that the defendants Howard F. Zahno also known as Francis Z. How-

ard, James H. Moyer and Mary M. Vaughan as directors of aforesaid Howard-Vaughan Co., Inc., a corporation, held a directors meeting on or about January 10th, 1938, and entered into a conspiracy with *with* defendants James Westervelt and Charles S. MacKenzie, and did not notify complainant that said directors meeting was to be held, and at said meeting provided that the former counsel for the said corporation, should be notified to turn over all property held by said former counsel to aforesaid defendants Westervelt and Charles S. MacKenzie as they were now the counsel for said corporation (the former counsel were Webster and Garside, attorneys-at-law, New York City, N. Y.). The said notification was given to the said former counsel for the said corporation, and in this manner, the said defendants Westervelt and MacKenzie conspiring in a conspiracy with the said defendant directors, procured from *from* the said law-firm of Webster and Garside, property consisting of personal property belonging to complainant, such as various kinds of documents, and papers, and thereby the said defendants and each of them procured and deprived complainant of his personal property by conspiracy and fraud, without jurisdiction and without due process of law.

XVI.

Complainant further avers, that on or about February 4th, 1938, the defendants Howard F. Zahno also known as Francis Z. Howard, James H.

Moyer and Mary M. Vaughan, as directors of aforesaid Howard-Vaughan Co., Inc., a corporation, held a directors meeting of said corporation, and did not notify complainant of said meeting to be held, and have always refused and continue to refuse to allow complainant to see the minutes of said meeting and the said defendants and the defendants James Westervelt [12] and Charles S. MacKenzie, and each of them, the said defendants, conspired in a conspiracy to defraud complainant of his property and property rights as described herein in this bill of complaint in equity and through conspiracy and fraud have deprived and denied complainant his constitutional rights without jurisdiction and without due process of law.

XVII.

Complainant further avers, that on or about February 17th, 1938, that the aforesaid defendant directors of aforesaid corporation and the defendants James Westervelt and Charles S. MacKenzie entered into a conspiracy to defraud complainant by holding a *a* directors meeting and did not notify the complainant and fraudulently associated other counsel with *with* the said Westervelt and MacKenzie as additional counsel for the aforesaid Howard-Vaughan Co., Inc., a corporation, for the sole purpose of further furthering the perpetration of the fraud as conspired and entered into by said defendants, and the furtherance of said fraud will be set forth hereinafter by the facts as shown

wherein the said Westvelter and Mackenzie have not only fraudulently represented the matter to the new counsel as additional counsel in a matter the said Westervelt and MacKenzie have fraudulently represented to the court and before the court in the State of New Jersey, for the sole purpose to defraud complainant of his property and property rights which are fully described in this bill of complaint in equity, which have been granted to complainant by the United States of America as it also provided for the complainant to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries, and the conspiracy and fraud perpetrated by the said defendants against the said complainant has denied to the complainant any such right as granted by the United States of America to said complainant. [13]

XVIII.

Complainant further avers, that on or about March 16th, 1938, the aforesaid defendant directors of said Howard-Vaughan Co., Inc., a corporation, and the defendants James Westervelt, Charles S. MacKenzie, entered into a conspiracy to defraud complainant by holding a directors meeting without otifying complainant of said meeting to be held, d said defendants through and by their conspiracy and fraud, held the said meeting for the purpose to defraud complainant and fraudulently authorized the making and execution of an un-

constitutional contract purported to be a trust agreement, and fraudulently appointed trustees in said trust agreement, for the sole purpose to fraudulently, illegally and unconstitutionally confiscate the property of complainant in the form of documents and corporation stock certificates belonging to complainant and did confiscate said property as specified herein, and in the appointment of said trustees in the said trust agreement the said defendants not only practiced fraud upon the complainant but also upon the trustees of said trust agreement, by fraudulently representing to said trustees that the said unconstitutional trust agreement was authorized by a lawful and proper meeting of the said directors of the said corporation, when as matter of fact the very meeting of the directors which authorized said trust agreement permeated with fraud itself, and therefore, the said directors meeting could not authorize anything much less a trust agreement to illegally, fraudulently and unconstitutionally confiscate the said property of complainant, and thereby the said defendants fraudulently deceived the said trustees and also deprived complainant of his property and property rights without jurisdiction and without due process of law, and at this time through and by the unconstitutional trust agreement which has been established upon a foundation of conspiracy and fraud, the said trustees are holding the aforesaid property of complainant [14] without jurisdiction and without due process of law.

XIX.

Complainant further avers, that on or about March 16th, 1938, the aforesaid defendant directors of the aforesaid Howard-Vaughan Co., Inc., a corporation, and James Westervelt and Charles S. MacKenzie, and each of them entered into a conspiracy to defraud complainant by holding a directors meeting and did not notify complainant of said meeting to be held, for the purpose to defraud complainant of his property hereinbefore described and thereby deprive complainant of his property and property rights without jurisdiction and without due process of law.

XX.

Complainant further avers, that on or about February 25th, 1939, that an agreement was made and entered into by between parties as follows: The Howard-Vaughan Co., Inc., a corporation of the State of New York, with principal place of business and principal office at Niagara Falls, New York, as party of the first part; Mary Vaughan, Francis Z. Howard and James H. Moyer, all of Niagara Falls, New York, as parties of the second part; James Westervelt of Santa Monica, California, and Charles S. MacKenzie, of Bound Brook, New Jersey, as parties of the third part; Dr. Francis A. Howard, of Jersey City, New Jersey, as party of the fourth part; Research Institute For Applied Science, Inc., party of the fifth part; and James I. Bowers, M. J. Cronin and Charles Levy,

as Trustees under the escrow agreement referred to, as parties of the sixth part; complainant avers that the said agreement is founded upon the conspiracy and fraud of the defendants as set forth herein and therefore, the said agreement is in itself the result of the conspiracy and fraud that has been built up by the various averments herein and therefore, the said agreement is an absolute fraud and of the principle of unconstitutional confiscation of [15] property and property rights of complainant without jurisdiction and without due process of law.

XXI.

Complainant further avers, that on or about the 4th day of March, 1939, that an agreement of retainer was made and entered into by and between Dr. Francis A. Howard of Jersey City, New Jersey, and Charles Levy, Attorney, New York City, New York, and Maurice J. Cronin, an attorney, of Jersey City, New Jersey, and said agreement having been made under the conditions which have been averred in this bill of complaint in equity, it would be impossible to operate and prosecute any action in any court under said contract, because the said contract is resting upon a foundation of fraud created by the conspiracy of the defendants as mentioned and set forth in this bill of complaint in equity, as the aforesaid defendants who are charged with conspiracy and fraud have misrepresented the true and correct situation to the said Maurice J. Cronin and Charles Levy, as the foundation upon

which this contract rests is a conspiracy and fraud established by the averments as contained herein for the purpose to defraud complainant of his property and property rights without jurisdiction in any court and without due process of law.

XXII.

Complainant further avers, that on or about the 25th day of February, 1939, that an agreement was made and entered into by and between Dr. Francis A. Howard and Research Institute For Applied Science, Inc., a domestic corporation, of the State of New York, and James I. Bowers, of Somerville, New Jersey, and Maurice J. Cronin, of Jersey City, New Jersey, and Charles Levy, of New York City, New York, for the purpose of establishing a trust estate under said agreement purported to be a trust agreement, when in fact the said agreement is not a trust agreement, but instead is an unconstitutional contract founded upon the conspiracy and fraud of the aforesaid defendants charged with [16] conspiracy and fraud, namely, the directors who are defendants, James Westervelt and Charles S. MacKenzie, which said defendants misrepresented the true facts to the trustees in said trust agreement, and through the said trust agreement complainant was deprived of his property by and through an illegal and unconstitutional confiscation of said property which is described as follows:

(a) Certificate #3, Class B stock of The Howard-Vaughan Co. Inc. for 450 shares presently

owned in the name of Research Institute for Applied Science, Inc.

(b) Certificate #161, Class A common stock of The Howard-Vaughan Co. Inc. for 50 shares originally issued to R. F. Howard, and subsequently on September 1st, 1938, duly assigned by said R. F. Howard to Francis A. Howard.

(c) Certificate #105, Class A common stock of The Howard-Vaughan Co. Inc. for 200 shares in the name of Research Institute for Applied Science, Inc.

(d) Certificate #139, Class A common stock of The Howard-Vaughan Co. Inc. for 275 shares in the name of Francis A. Howard.

(e) Certificate #163, Class A common stock of The Howard-Vaughan Co. Inc. for 106 shares in the name of Francis A. Howard.

(f) Certificate #4, Class B, common stock of The Howard-Vaughan Co. Inc. for 10 shares in the name of Francis A. Howard.

And the said agreement of trust unconstitutionally provides such provisions as are all unconstitutional, because said purported trust agreement is a document of unconstitutional deprivation and confiscation of not only complainants property and property rights, but his citizenship rights as well, also personal property in the form of documents belonging to complainant have been taken by said document purported to be a trust agreement when in fact it is not a document that is permissable under the constitutional rights of complainant be-

cause the said purported trust agreement is founded upon a foundation of conspiracy and fraud which is set forth in this complaint in equity and your complainant hereof has been defrauded of his property and property rights by each and every movement that was made by the aforesaid defendants who have been charged with conspiracy and fraud in this bill of [17] complaint in equity, for the sole purpose of defrauding complainant of his property, therefore, any action which might be prosecuted under any of the aforesaid fraudulent documents purporting to give any such authority, would not have any jurisdiction in any court in the United States of America, as it is an illegal unconstitutional foundation founded and built up on the foundation of conspiracy and fraud to unconstitutionally defraud complainant of his property and property rights without jurisdiction and without due process of law, and any attempt to prosecute an action in any court under such an illegal and fraudulent set-up would be nothing short of practicing fraud against the complainant hereof but also upon the court as well for the purpose to defraud complainant of his property and property rights without jurisdiction and without due process of law.

XXIII.

Complainant further avers, that at this time of filing this bill of complaint in equity, that the aforesaid defendants, Howard F. Zahno also known as Francis Z. Howard, James H. Moyer, Mary M.

Vaughan, as directors of aforesaid Howard-Vaughan Co., Inc., a corporation, and James Westervelt and Charles S. MacKenzie, misrepresented the facts to aforesaid James I. Bowers, M. J. Cronin and Charles Levy, as complainant feels at this time, that had the said Bowers, Cronin and Levy known of the fraudulent conspiracy and fraud of the said five defendants, that the said Bowers, Cronin and Levy would not have become a party to the various contracts and agreements in which they have become parties, and complainant have named said Bowers, Cronin and Levy, as defendants for the purpose of eliminating all contracts and procedures signed by the said Bowers, Cronin and Levy, which have come into existence and being upon the fraudulent representations of the said Defendant directors of said corporation and the said defendants, Westervelt and MacKenzie, to defraud complainant of his property and property rights. [18]

XXIV.

Complainant further avers, that on or about during the month of June 1938 that the defendants, Howard F. Zahno also known as Francis Z. Howard, James H. Moyer, Mary M. Vaughan, as directors of aforesaid Howard-Vaughan Co., Inc., a corporation, and defendants James Westervelt and Charles S. MacKenzie, caused to be filed in Chancery of New Jersey an action under the title of The Howard-Vaughan Co., Inc., a corporation,

against various and numerous defendants, which said action is founded upon the conspiracy and fraud as set forth in this bill of complaint in equity, and the said defendants, thereby expect to further illegally and unconstitutionally confiscate the property and property rights of complainant without jurisdiction and without due process of law, and further cause to complainant irreparable losses, injuries and damages without due process of law.

XXV.

Complainant further avers, that the aforesaid conspiracy and fraud as set forth in this bill of complaint in equity, have caused complainant irreparable losses, injuries and damages, and that further losses, injuries and damages are threatened by the aforesaid conspiring defendants, which would cause irreparable losses, injuries and damages, and thereby bring into a situation in which it would be doubtful if any chance to recover in any manner from the irreparable losses, injuries and damages which would be caused to complainant without jurisdiction and without due process of law, and complainant as an inventor and discoverer of useful and scientific arts would be unconstitutionally deprived of his property and property rights as granted by the United States of America and its agencies which protect inventors and discoverers and their inventions and discoveries against the conspiracy and fraud of the aforesaid

defendants who have perpetrated said fraud as set forth in this bill of complaint in equity. [19]

XXVI.

Complainant further avers, that on or about October 6th, 1934, that the directors of The Howard-Vaughan Co., Inc., a corporation, held a meeting of the said directors, and said meeting was held at Niagara Falls, New York, and at said meeting a resolution was passed wherein the secret formula of complainant which is used for purposes hereinbefore stated, wherein said secret formula was transferred and assigned to the said corporation for the purpose of effecting a sale of the entire assets of said corporation with the understanding that if the said sale was not consummated that the said secret formula would be assigned and reassigned back to complainant, but when the said sale did fail to consummate and was not made as proposed, complainant then requested the said directors to reassign said secret formula to complainant and said request has been made on several occasions and numerous times up to and including recent times and in each and every instance the said directors have refused to reassign said secret formula to complainant and in the year of 1936 when the aforesaid defendant James Westervelt first made his appearance in the aforesaid and said corporation as counsel and advisor to the said board of directors, and after said Westervelt had been told and informed of the circumstance surrounding the said

secret formula, he advised the said directors not to reassign the said secret formula to complainant and the said directors and said Westervelt conspired in a conspiracy to defraud complainant of his secret formula and have continually after various and many requests and demands to said directors and said Westervelt to have them reassign said secret formula to complainant the said defendants have in each and every instance refused to reassign and deliver the said secret formula to complainant and thereby through said conspiracy and fraud of said defendants defraud complainant of his property and property rights which have been granted to complainant by the United States of America. [20]

Wherefore, complainant respectfully prays for process and judgment as follows, to wit:

1. That the court adjudge and decree as being invalid, null, void, cancelled and of no force and effect, just the same as if non-existent the following patents which were procured by aforesaid defendant Thomas Midgley, Jr., which said patents are as follows: Patent No. 1,491,998 issued April 29th, 1924;

Patent No. 1,501,568 issued July 15th, 1924;

Patent No. 1,573,846 issued February 23rd, 1926; Said patents were issued by the United States Patent Office to Thomas Midgley, Jr., defendant herein, upon his fraud representation.

2. That the directors meetings held as set forth in the bill of complaint, by the directors of the

Howard-Vaughan Co., Inc., a corporation, be adjudged and decreed as null and void and of no force and effect whatsoever upon the grounds of fraud.

3. That the contract dated October 2, 1936, between Defendant James Westervelt and Fred E. Stivers and the Howard-Vaughan Co., Inc., a corporation, or any other contract held with said Westervelt with said corporation or the complainant be adjudged and decreed as being invalid, null and void and cancelled and of no force and effect whatsoever, a fraud.

4. That the agreement made and entered into on or about February 25th, 1939, by and between the Howard-Vaughan Co., Inc., party of first part; Mary Vaughan, Francis Z. Howard, and James H. Moyer, parties of the second part; James Westervelt, and Charles S. MacKenzie, parties of the third part; Dr. Francis A. H. Howard, party of the fourth part; Research Institute For Applied Science, Inc., party of the fifth part; and James I. Bowers, M. J. Cronin and Charles Levy, as Trustees, as parties of the sixth part; That the court adjudge and decree said agreement a fraud, null and void, cancelled and of no force and effect whatsoever, as being the result of a conspiracy and fraud. [21]

5. That the agreement made and entered into on or about this 4th day of March, 1939, by and between Dr. Francis A. Howard, Maurice J. Cronin and Charles Levy, be adjudged and decreed as null

and void, cancelled and of no force and effect, just the same as if non-existent, as being the result of a conspiracy and fraud as set forth in bill of complaint in equity hereof.

6. That the agreement made and entered into on or about the 25th day of February, 1939, by and between Dr. Francis A. Howard and Research Institute For Applied Science, Inc., James I. Bowers, Maurice J. Cronin, and Charles Levy, as a purported trust agreement, be adjudged and decreed invalid, null and void, and cancelled and of no force and effect whatsoever, and as being unconstitutional and the result of a conspiracy and fraud.

7. That the defendants and each of them be ordered to return to complainant all property of any and all kinds that they are holding in their possession which belongs to complainant.

8. That the complainant be given judgment for all costs, including court costs and attorney's fees arising and accruing in the prosecution of this cause and action.

Wherefore, complainant prays for such other aid, order, orders, judgment, judgments, and relief as the court may deem just and proper in the premises.

Dated: Los Angeles, California, October 28, 1939.

FRANCIS A. HOWARD
Complainant in Propria Persona.

[22]

United States of America
State of California
County of Los Angeles—ss.

Francis A. Howard, being by me first duly sworn, deposes and says: That he is the complainant in the above entitled matter, that he has read the foregoing Bill of Complaint in Equity and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

FRANCIS A. HOWARD,
Complainant.

Subscribed and sworn to before me this 30th day of October, 1939.

[Notarial Seal] HARRIET M. ERMOLD
Notary Public, in and for the County of Los Angeles, State of California.

My Commission Expires Sept. 1, 1941.

[Endorsed]: Filed Oct. 30, 1939. [23]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., AND JAMES WESTERVELT.

Come now the defendants E. H. Archer, The Howard-Vaughan Co., Inc., and James Westervelt, and for Their Answer to the Bill of Complaint

herein, each for himself or itself, admit, deny and allege as follows:

I.

Answering Paragraph I, allege that complainant is a resident of the City of Hoboken, New Jersey, and has been such resident for over one year last past, and that he has no legal residence or place of residence or abode within the Southern District of California. And in this connection defendants further allege that they have made great efforts within the month or six weeks last past, to locate said complainant in order to serve him with certain legal process, but have been informed by the Sheriff of Los Angeles County that he cannot be found therein, and by their investigator, Charles J. Siems, that said complainant is in hiding, and for that reason so allege.

II.

Deny each and every allegation in Paragraph III.

III.

Admit, and adopt as their own, all and singular the allegations contained in Paragraphs IV, V and VI of said Complaint. [25]

IV.

Admit, and adopt as their own, all and singular the allegations contained in Paragraphs VII, VIII and IX of said complaint, except that they allege that "Vitagas", and not "Vitigas" was the name

adopted and used by said The Howard-Vaughan Co., Inc., and by complainant insofar as he had any power or right to use the same, for the formula described in the Bill of Complaint herein and in said last named paragraphs thereof and for the chemical compound made pursuant thereto. And in this connection these defendants allege that the said secret formula, for a chemical compound called "Vitagas" described in the Bill herein, and the process for compounding same, was by said complainant assigned to defendant, The Howard-Vaughan Co., Inc., in June, 1916 at the time of its incorporation, for a valuable consideration in stock of said corporation then and there issued to him, said complainant, most of which stock complainant still holds and owns or claims to own. And these defendants beg leave to draw to this Court's particular attention the allegations in Paragraph VIII of the Bill of Complaint herein to the effect that, during 1916 and 1917 complainant, acting in the name of defendant herein, The Howard-Vaughan Co., Inc., filed applications with the U. S. Commissioner of Patents for trademark and registered label covering the use by said defendant corporation of the trade name adopted for said formula and chemical compound.

V.

Further answering said paragraphs IV to IX inclusive of the Bill of Complaint and in bar of this action, these defendants further allege that in

January, 1938, complainant filed an action in Chancery of New Jersey, numbered 120-704, in which he was complainant and the defendants herein, The Howard-Vaughan Co., Inc., and Thomas Midgley, Jr., among others were defendants; that in his Bill of Complaint therein this complainant alleged substantially the same facts as are set forth in Paragraphs IV to IX of the Bill herein, and further alleged that he was the owner of said secret formula, chemical compound and process; that, subsequently defendant herein, The Howard-Vaughan Co., Inc., filed a petition in said action No. 120-704, denying that complainant was such [26] owner, expressly alleging that it, said The Howard-Vaughan Co., Inc., was the owner by assignment from complainant, as herein alleged, and praying that said action No. 120-704 be dismissed on the merits and that complainant be enjoined and forever restrained from again asserting such ownership in himself and from bringing any action against the defendants therein named or any of them based upon such claim of ownership; and that thereafter, after said complainant and defendant had been fully heard and had introduced oral testimony and documentary evidence, the said Court of Chancery of New Jersey, on May 4th, 1938, duly made its Order dismissing the said action so brought by this complainant, finding expressly that The Howard-Vaughan Co., Inc., and not the Complainant, was the owner of said "secret formula for a chemical compound called 'Vitagas',

and of the process for compounding same, and that The Howard-Vaughan Co., Inc., a corporation of the State of New York, has the sole right to maintain any action or proceeding based upon such ownership", and enjoining said complainant "from bringing, prosecuting or maintaining any action in this court or in any court in this or any other jurisdiction" against any of the defendants named in said action, "upon any cause of action based or founded upon any claim of ownership by" him of the aforesaid secret formula or process; all of which more fully appears by said Order a duly exemplified copy whereof these defendants are ready to produce to this Court at any time.

VI.

Allege that neither these defendants nor any of them have or has any knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph X of the Complaint herein and, base their denial on that ground deny the same and each and all thereof, except that they admit that Thomas Midgley, Jr., practised fraud upon the Patent Office and perjured himself as therein alleged, but specifically deny that complainant was thereby deprived of anything.

VII.

Deny, generally and specifically, each and every allegation contained in Paragraphs XI, XII and XIII of the Bill of Complaint, except that they admit that directors' meetings of defendant corpo-

ration were held on or about the dates mentioned in said paragraphs, but ex- [27] pressly deny that any of said meetings was or were called or held without due and proper notice to said complainant or that any formality required by law or the By-Laws of the corporation was omitted or dispensed with, and specifically deny that any of these defendants ever conspired together for any purpose or that any of the several conspiracies sought to be described in and by said paragraphs ever existed or were ever in the contemplation or minds of any of these defendants or, as they are credibly informed and believe, and therefore allege, in the contemplation or minds of any of the other defendants herein; and further deny that complainant has been deprived of any right, property, asset or thing of value, by virtue of anything alleged in said Bill of Complaint.

VIII.

Deny, generally and specifically, all and singular the allegations in Paragraph XIV of the Bill herein, and expressly allege that the contract of October 2, 1936, was drafted, composed and personally typed by complainant himself, and that same was thereafter approved by the directors of defendant corporation at a meeting duly called according to law and the By-Laws of said defendant, of which meeting complainant had, and expressly admitted having, full, due and legal notice in writing.

IX.

Deny, generally and specifically, each and every allegation contained in Paragraphs XV, XVI and

XVII of said Bill of Complaint and expressly deny that any of the so-called conspiracies in said paragraphs attempted to be described ever existed or had any being except in the fruitful imagination of the complainant, and further deny that he was ever deprived of anything by any action, direct or indirect of any of the defendants.

X.

Deny, generally and specifically each and every allegation in paragraphs XVIII, XIX, XX, XXI and XXII of said Bill, except that they admit that a retainer agreement was signed as described in said paragraph XXI, and further answering so far as humanly possible the jumbled allegations [28] therein contained, these defendants allege that the several allegations contained in said five paragraphs all purport to refer to, or describe, an allegedly "unconstitutional" contract or trust agreement, and hereby allege that the facts concerning the same are as follows:

On or about January 30 or 31, 1938, and concurrently with the filing by him in Chancery of New Jersey of the aforesaid action No. 120-704, complainant served on the defendant The Howard-Vaughan Co., Inc., a unilateral notice of revocation or rescission of the assignment in 1916 by him to said corporation of the secret formula and the chemical compound made in conformity therewith and process for compounding same, called "Vitagas", and called a stockholders' meeting of said

corporation for the purpose of ousting the three directors thereof, other than himself, defendants Vaughan, Moyer and Zahno, or Howard. Said corporation and said three directors, defendants herein, thereupon filed in the Supreme Court of New York in and for Niagara County an action against the said Francis A. Howard, complainant herein. In their complaint therein they alleged that the said corporation was, and had since 1916 been, the owner, by due assignment from him, said Francis A. Howard, of said secret formula, compound and process; that the said corporation had retained defendant James Westervelt to bring suit on its behalf against Standard Oil Co. of New Jersey, General Motors Corporation, E. I. DuPont de Nemours Corporation, Ethyl Gasoline Corporation, et al, for damages in an immense sum for the theft by said corporations last named of the aforesaid secret process and subsequently obtaining alleged U. S. Letters Patent for Ethyl Gas, so-called, same being identical with "Vitagas"; that complainant wrongfully refused to assist in carrying out the will of a majority of the directors of said The Howard-Vaughan Co., Inc., or to co-operate in any way with its attorneys in filing or maintaining said proposed action; that he had wrongfully appropriated to his own use a large quantity of the stock of said The Howard-Vaughan Co., Inc., and had filed said action No. 120-704 in New Jer- [29] sey in his own name, claiming as against said corporation, his assignee, the ownership of said formula, compound

and process; and that he had called said stockholders' meeting in furtherance of his said scheme to despoil said The Howard-Vaughan Co., Inc., and its stockholders of the very property which he had assigned to it; and praying that so much of the stock in said corporation as he should be found to have stolen or wrongfully acquired be restored to its true owners and that meanwhile he be enjoined and restrained from voting any of his stock in any corporate meeting. An order to show cause and restraining order was accordingly issued and said complainant thereafter continuously remained in hiding to avoid service of any process.

Subsequently, and after the entry of the order of May 4th, 1938, which is described in paragraph V hereof, said Francis A. Howard, at the suggestion of defendant herein, Charles Levy, who had long been his personal attorney, and who had acted as attorney in said action in Niagara County, New York for said Howard's co-defendant, Research Institute for Applied Science, really his alter ego and dummy corporation, retained the defendant herein, M. J. Cronin, to negotiate a settlement of said Niagara County action with the defendants herein, Mackenzie and Westervelt, as attorneys for defendants Vaughan, Moyer, Zahno and The Howard-Vaughan Co., Inc. After months of intensive negotiations and conferences between said attorneys, complainant and correspondence with plaintiffs in said action in Niagara County, the defendants Vaughan, Moyer, Zahno and The Howard-Vaughan

Co., Inc., and after several times drafting and redrafting it, the contract which Complainant now dubs unconstitutional and fraudulent was entered into by all the parties deliberately, as the best means of composing their differences and successfully carrying on the litigation in New Jersey against the Standard Oil, General Motors and DuPont interests. During the negotiations leading up to, and in the actual execution of said contract, or trust agreement, the said Francis A. Howard was at all times forcefully and ably represented by the said M. J. Cronin, an able member of the New Jersey Bar of high repute, and by the said Charles Levy, a highly reputable and experienced member of the New York Bar, [30] and every phase of Complainant's rights in the premises was painstakingly and thoroughly explored by them, in frequent long and arduous conferences with defendants Mackenzie and Westervelt. No misrepresentation whatever was practised by the latter two named defendants upon said Cronin or Levy, nor was a single fact, no matter how remotely pertinent to the matters in hand, withheld from them. Said contract was executed as of February 25, 1939, and duly ratified and approved at a meeting of directors of The Howard-Vaughan Co., Inc., duly called and held on or about March 10, 1939, due notice whereof was given said complainant, and the action taken by said directors was approved in advance by complainant's said attorneys, the defendants Cronin and Levy. Throughout the entire matter, as these answering defendants

are credibly informed and believe and therefore allege, no possible reasonable precaution to safeguard complainant's rights, or the rights of the several other parties to said contract was omitted. And these defendants specifically and expressly deny that any of the defendants herein entered into any of the several different conspiracies alleged in said several paragraphs XVIII to XXII of the Bill herein, or did any act or thing in furtherance of any such conspiracy or conspiracies, and further deny that any such conspiracy ever existed outside of the fertile imagination of complainant.

XI.

Deny each and every allegation in Paragraph XXIII.

XII.

Deny each and every allegation in paragraph XXIV of complaint except that they admit that an action was filed as No. 122-229 in Chancery of New Jersey by and on behalf of The Howard-Vaughan Co., Inc., against Standard Oil Co. (New Jersey), Standard Oil Co. of New Jersey, General Motors Corporation, E. I. DuPont de Nemours & Co., Inc., et al to recover against said named defendants therein for the theft by them of the secret formula aforesaid, but specifically deny that the same was in any based or founded upon any conspiracy or fraud described or set forth in the Bill of Complaint herein, and allege that no conspiracy [31] or fraud such as is referred to in said paragraph XXIV of

the Bill herein is properly alleged or set forth in said Bill either in the said paragraph or elsewhere, and for that reason it is impossible for these defendants to further answer said paragraph.

XIII.

Answering Paragraph XXV, these defendants, drawing the Court's attention to the fact that no "irreparable losses, injuries and damages" are in any manner described, named or set forth therein or elsewhere in the Bill of Complaint, expressly deny that complainant has suffered any loss, injury or damage whatever by reason of anything in this paragraph or in the Bill set forth or alleged or attempted to be alleged therein, nor by reason of any act of any defendant herein named, and further specifically deny every allegation in said paragraph XXV.

XIV.

Deny, generally and specifically each and every allegation in paragraph XXVI of the complaint, and allege that complainant has never at any time prior to the filing of this action made any claim or statement such as that set forth in said paragraph XXVI. The facts concerning said meeting of October 6th, 1934, are that at that time the old Minute Book of said corporation had been lost and certain resolutions were proposed by said complainant and unanimously carried, reciting said loss and stating that in June, 1916, at the organization meeting of the corporation, the secret formula for "Vitagas",

the compound and process and all rights of complainant in and to said discovery or invention had been duly assigned to the corporation by him in consideration of the issuance to him of certain shares of the corporation's capital stock. The minutes of said meeting of October 6th, 1934, were signed by all the directors, including this complainant, and were introduced and received in evidence upon the hearing in action No. 120-704 in the Court of Chancery of New Jersey hereinabove described. [32]

XV.

As a separate defense herein, these defendants allege that the Bill of Complaint herein does not state facts sufficient to constitute a cause of action against these defendants or any of them, and pray the benefit of this defense as though made by motion to strike.

XVII.

As a further and additional separate defense herein, they allege that this Court has no jurisdiction over the subject matter of the cause or causes of action attempted to be set forth in the Bill, and pray the benefit of this defense as though made by motion to strike.

XVII.

As a further and additional separate defense herein, they allege that this action is barred by the previous adjudication of the Court of Chancery of

New Jersey hereinbefore described, alleged and set forth, and pray the benefit of this defense as though made by motion to strike.

XIX.

As a further and additional separate defense herein, they allege that several distinct causes of action are improperly joined, in that the Bill attempts to set forth at least five different conspiracies with different defendants alleged to have conspired in each such "conspiracy", and pray the benefit of this defense as though made by motion to strike.

Wherefore these defendants pray that complainant take nothing by this action and that same be dismissed with prejudice and that defendants have such other and further relief as to the Court shall seem proper.

JAMES WESTERVELT
In Pro. Per. & as Attorney for
Defendants E. H. Archer &
The Howard-Vaughan Co.,
Inc.
440 19th St., Santa Monica, Calif.

State of California,
County of Los Angeles—ss.

James Westervelt, being duly sworn says that he is one of the answering defendants herein, that he has read the foregoing answer and that same is

true of his own knowledge except as to matters therein stated on information and belief and as to those matters he believes it to be true.

JAMES WESTERVELT

Subscribed and sworn to before me this 28 day of December, 1939.

FLORENCE A. BARTELS

Notary Public in and for the State of California, County of Los Angeles.

[Endorsed]: Filed Dec. 30, 1939. [33]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS

To Francis A. Howard, Complainant, & Calvin S. Mauk, Esq., His Attorney, 305 Continental Building, Los Angeles, California:

Please take notice that the defendants hereinbelow named will move this court, at the courtroom of Hon. Leon. R. Yankeich, Judge, on the second floor of the new Post Office & Federal Building, at Temple & Main Streets, Los Angeles, on Monday, January 15, 1940, at ten o'clock, (10.00) A. M., or as soon thereafter as counsel can be heard, for Judgment on the Pleadings herein. Said motion will be bases upon the Bill of Complaint and the verified Answer of the undersigned defendants on file herein.

This supplementary Notice of this Motion is served because the undersigned has learned since the former notice was prepared that Calvin S. Mauk, Esq., has been substituted as Attorney for complainant.

Dated January 4th, 1940.

JAMES WESTERVELT
Deft. in Pro. Per. & as Attorney for defendants E. H. Archer & The Howard-Vaughan Co., Inc.
440 19th Street, Santa Monica, Cal.
Tel. Santa Monica 21001

Authorities:

Cal. C. C. P. Sec. 1030;
Fed. Rules of Civil Procedure, Rule 64;
Act of June 19, 1934, c. 651, Secs. 1 & 2;
U. S. Code, Title 28, Secs. 724 & 725.

Service of copy of within Notice admitted this 5th day of Jany. 1940.

CALVIN S. MAUK
Atty. for Complainant

[Endorsed]: Filed Jan. 5, 1940. [34]

[Title of District Court and Cause.]

To Francis A. Howard, Complainant, & Calvin S. Mauk, Esq., his Attorney, 305 Continental Building, Los Angeles, California:

Please take notice that the defendants hereinbelow named will move this Court at the Court-

room of Hon. Leon R. Yankwich, Judge of this Court, on the second floor of the new Post Office and Federal Building, at Temple & Main Streets, Los Angeles, on Monday, January 15th, 1940, at ten (10.00) A. M. or as soon thereafter as counsel can be heard, for Summary Judgment for defendants herein. Said Motion will be based on the Bill of Complaint and the verified answer herein and the Final Order of the Court of Chancery of New Jersey of May 4, 1938, a duly exemplified copy whereof is annexed hereto and served herewith upon you.

Dated, Los Angeles, California, January 4th, 1940.

JAMES WESTERVELT
Deft. in Pro. Per. & as Attorney for Defts. E. H. Archer & The Howard-Vaughan Co., Inc.

[Endorsed]: Filed Jan. 5, 1940. [35]

In Chancery of New Jersey

120-704

Between

FRANCIS A. HOWARD,

Complainant,

and

STANDARD OIL COMPANY (NEW JERSEY), STANDA*R*D OIL COMPANY OF NEW YORK, GENERAL MOTORS *CORPORA-TIO,* ETHYL GASOLINE CORPORATION, THOMAS MIDGLEY, JR., CHARLES F. KETTERING, THE HOWARD-VAUGHAN CO., INC.

Defendants.

ON BILL, ETC.

ORDER DISMISSING BILL OF COMPLAINT

Defendant, The Howard-Vaughan Co., Inc., a corporation of the State of New York, having filed a petition in this cause on February 28, 1938, and a certain order to show cause having been made on said petition, returnable March 8, 1938, which said rule to show cause was brought on for hearing on March 15, 1938, and partially completed, and an order having been made by the court on the court's own motion on March 17, 1938, that the several affiants who made affidavits annexed to the bill of complaint herein and/or annexed to the petition aforesaid, and/or otherwise presented to this court on the part either of the complainant or of the said

defendant-petitioner, shall appear before this court at the said continuation of the said hearing to be had on March 29, 1938, and submit to cross-examination in respect to the several matters contained in their respective affidavits; and that the said complainant and the said defendant-petitioner, or their respective solicitors do cause the said several respective affiants to appear for that purpose at the time and place set forth for the said continuation of said hearing; and

It was further ordered that at the same time and place the said parties do produce and submit to the court the several matters of written evidence mentioned and referred to in said affidavits; and

It was further ordered that at the same time and place, the said parties, or either of them, may offer such further—testimony and/or other evidence as they may deem advisable, with reference to [36] the issue as to whether the right to institute and maintain action against the defendants named in the complainant's bill (other than the defendant Howard-Vaughan Co., Inc.) on the cause or causes of action mentioned and set forth in the said bill of complaint, inheres in the said complainant or in the said defendant Howard-Vaughan Co., Inc.; and

The hearing on the petition above mentioned and the rule to show cause thereon having been continued from March 29, 1938, to April 5, 1938, and the court, in accordance with the said order for cross-examination of March 17, 1938, having taken testimony thereon on April 5, 1938, and the hearing

not having been completed on that day and the court being of the opinion that the same should be continued for further testimony and hearing in accordance with the said order for cross-examination, and the hearing having been continued to a further date, to wit: April 12, 1938, on which day the taking of testimony was concluded;

And the court having considered the affidavits and the testimony of the various witnesses taken in open court, together with the various documents introduced in evidence, and the court having considered the arguments and the briefs of the respective solicitors, and James I. Bowers, Charles S. Mackenzie and James Westervelt, appearing for the petitioner, the Howard-Vaughan Co., Inc. a corporation of the State of New York, one of the defendants herein, and James S. Brown of Kealey and Gilfert, solicitors appearing for the complainant, Francis A. Howard, and the court having concluded the prayer of the petition of the Howard-Vaughan Co., Inc., a corporation of the state of New York should be granted;

It is thereupon, on this third day of May, 1938, on motion of James I. Bowers, solicitor for the petitioner, the Howard-Vaughan Co., Inc., a corporation of the State of New York, one of the defendants herein, ordered, adjudged and decreed that the prayer of the petition of the Howard-Vaughan Co., Inc., a corporation of the State of New York, be granted and that the petitioner, the Howard-Vau- [37] ghan Co., Inc., a corporation of

the State of New York, one of the defendants herein, is the owner of the secret formula for a chemical compound called the "Vitagas" described in the bill herein, and of the process for compounding same, and that the Howard-Vaughan Co., Inc., a corporation of the State of New York, has the sole right to maintain any action or proceeding based upon such ownership, and that the complainant, Francis A. Howard, has and has had no legal right for the filing of the bill of complaint herein as a stockholder of the said Howard-Vaughan Co., Inc., a corporation of the State of New York.

It is further ordered, adjudged and decreed that the bill of complaint herein be and the same is hereby dismissed as to all the defendants named in said bill of complaint, with costs to the petitioner, the Howard-Vaughan Co., Inc., a corporation of the State of New York.

It is further ordered, adjudged and decreed that the complainant, Francis A. Howard, be and he is hereby restrained and enjoined from bringing, prosecuting or maintaining any action in this court or in any court in this or in any other jurisdiction against the defendants mentioned in the bill of complaint, or any of them upon the cause of action set forth in the bill of complaint filed herein, or upon any cause of action based or founded upon any claim of ownership by said Francis A. Howard, of the aforesaid secret formula for a chemical compound called "Vitagas" described in the bill of complaint filed herein and the process for com-

pounding same; provided however, that nothing herein contained shall preclude the said complainant from applying to this court for a modification or vacation of the restraint herein contained upon due notice and upon proof of changed circumstances.

Respectfuly advised

LUTHER A. CAMPBELL

C.

MALCOLM G. BUCHANAN

V.C.

A true copy.

EDW. L. WHELAN

Clerk

[Endorsed]: Service of copy of within Notice admitted. Calvin S. Mauk, Atty. for Complainant.

[Endorsed]: Filed Jan. 5, 1940. [38]

[Title of District Court and Cause.]

NOTICE OF MOTION AND PETITION TO AMEND, AND MOTION TO AMEND AND PETITION TO AMEND BILL OF COMPLAINT IN EQUITY

To James Westervelt, Defendant, in Propria Persona, and as Attorney for Defendants E. H. Archer and The Howard-Vaughan Co., Inc., a corporation; 440 19th Street, Santa Monico, California:

You and each of you, please take notice that the complainant Francis A. Howard, will,

Move the Court, in the above entitled cause and action, on Monday, January 15th, 1940, at ten (10:00) o'clock A. M., or as soon thereafter as counsel may be heard, to amend the bill of complaint in equity on file, by a petition and motion to amend said bill, upon the grounds as set forth in petition to amend said bill of complaint and said motion filed and served in above entitled cause and action.

Dated: Los Angeles, California, January 8th, 1940.

CALVIN S. MAUK
Solicitor for Complainant and Petitioner

Petition to Amend Bill of Complaint in Equity and Memorandum of Points and Authorities Filed Herewith in Support of Petition to Amend made a part hereof.

[Endorsed]: Filed Jan. 9, 1940. [39]

[Title of District Court and Cause.]

MOTION TO AMEND BILL OF COMPLAINT IN EQUITY

Comes now Francis A. Howard complainant and petitioner, who by and through his counsel Calvin S. Mauk, in the above entitled cause and action:

Moves the Court, to amend the bill of complaint in equity, upon grounds as set forth in the petition to amend the bill of complaint in equity,

filed and served in above entitled cause and action, and attached hereto and made a part hereof.

Dated: Los Angeles, California, January 8th, 1940.

CALVIN S. MAUK
Solicitor for Complainant and Petitioner

Memorandum of Points and Authorities Filed Herewith in Support of Petition to Amend Bill of Complaint in Equity made a part hereof.

[Endorsed: Filed Jan. 9, 1940. [40]

[Title of District Court and Cause.]

PETITION TO AMEND BILL OF COMPLAINT IN EQUITY FOR INVALIDATION OF PATENT, INVALIDATION OF UNCONSTITUTIONAL CONTRACTS, CONSPIRACY AND FRAUD, ETC.

Comes now Francis A. Howard complainant in the above entitled cause and petitions the court and begs leave to amend the *the* bill of complaint in equity filed in the above entitled cause and action in equity, upon grounds as follows, to wit:

I.

That the bill of complaint in equity on file contains provisions for numerous and various fictitious named defendants, many of whom your petitioner and complainant have recently discovered their

correct names and addresses, each of said defendants would have to be made party defendants to this above entitled cause and action for the purpose of the above named court making a lawful and equitable determination in an adjudication of the above entitled matter.

II.

That the pleadings filed in the above cause by defendant James Westervelt in Propria Persona for himself and behalf of defendants E. H. Archer and The Howard-Vaughan Co., Inc., a corporation, particularly, the motion for summary judgment based upon the bill of complaint in equity, the verified answer of said defendant and for said defendants and the order dismissing bill of complaint in Chancery of New Jersey; the said motion for summary judgment and [41] order dismissing bill of complaint in Chancery of New Jersey in the State of New Jersey have no jurisdiction in the above entitled cause and action before the above named court; the complainant is not prosecuting the above entitled cause as a stockholder of The Howard-Vaughan Co., Inc., a corporation; the complainant is prosecuting the above entitled cause and action individually in behalf of complainant's constitutional rights which are granted to authors and inventors to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries, and complainant hereof,

has been denied and deprived of said exclusive right by and through conspiracy and fraud by the defendants and each of them in the above entitled cause, and complainant has further discovered since the filing of the bill of complaint in equity, numerous and various defendants and their correct names and addresses, who are named as fictitious named defendants, and further since the filing of the said bill of complaint in equity in above entitled cause, complainant has discovered a huge and gigantic conspiracy and fraud perpetrated and executed against complainant and discovery of said conspiracy and fraud was made by complainant on or about Wednesday, January 3rd, 1940, and the aforesaid named defendants and each of them, and the fictitious named defendants whose true and correct names and addresses have been discovered since the filing of the bill of complaint in equity in above entitled cause and action, have also confederated and participated in the conspiracy and fraud heretofore set forth in said bill of complaint in equity and also in the said huge and gigantic conspiracy and fraud discovered by complainant on or about Wednesday, January 3rd, 1940, and therefore, it is necessary that the said newly discovered fictitious named defendants whose true and correct names and addresses have been discovered by complainant will have to be made parties as defendants to the above entitled cause and action for the purpose of the above entitled court making a lawful [42] and equit-

able determination in an adjudication of the above entitled cause and action which would be impossible without making the said parties whose true and correct names and addresses have been discovered parties to the above entitled cause and action and having them brought in as defendants in the above entitled cause and action.

III.

That complainant has been a resident of the County of Los Angeles, State of California for more than one year, the last year past, and intends to always maintain his residence in Los Angeles County, State of California permanently, which complainant has done for several years past, and such residence is supported by numerous affidavits which are filed herewith in support of residence of complainant in Los Angeles County and the City of Los Angeles, State of California, and complainant at various times has been east on business matters and matters in litigation but has at all times maintained his business office and residence in Los Angeles County, State of California. (See, eight (8) affidavits in support of petition hereof and residence of Francis A. Howard complainant in California, made a part hereof.)

IV.

That complainant has not been in hiding as alleged by defendant, James Westervelt, who is appearing on the record in above entitled cause in propria persona and in behalf of defendants E. H.

Archer, and The Howard-Vaughan Co., Inc., a corporation, as their counsel of record, said allegation being made by said defendant in paragraph I of the answer to bill of complaint in equity filed in above entitled cause, and complainant denies that he is in hiding, and further states, that on Wednesday, January 3rd, 1940, that the so-called investigator for the said defendant, namely, Charles J. Siems, in behalf of himself and James Westervelt, defendant in the above entitled cause and action, called upon the complainant at the office of complainant at 342 Wilcox Building, City of Los Angeles, County of Los Angeles, State of California; said investigator, Charles J. Siems arriving at the said office of complainant at about [43] 9.15 A. M., and conversed with complainant Francis A. Howard until about 2.30 P. M., said date, and during said time there were several persons present who heard the conversation between the said Charles J. Siems and the said Francis A. Howard complainant, and at no time during the time that said Charles J. Siems was in said office talking with said Francis A. Howard did the said Charles A. Siems make any effort to serve the said Francis A. Howard with process of any kind, but he did however state that he knew where the said Francis A. Howard was at all times and he could serve him at any time. (See, affidavits of Francis A. Howard, Conrad S. Taylor and Adam J. Yacenda, filed herewith in support of petition hereof and made a part hereof.)

V.

That the questions involved in the above entitled cause and action are all matters over which no State Legislation or State Court have any jurisdiction, because the matters involved in said cause and action concern a conspiracy and fraud relative to patents issued by the United States Patent Office, Trade Marks, Copyrights, restraint of Trade and Commerce in Interstate Trade and Commerce, and unlawful price fixing in a monopolistic system against complainant contrary to the antitrust laws and other Federal Laws of the United States of America, which said conspiracy and fraud and the aforesaid huge conspiracy and fraud discovered by complainant on or about January 3rd, 1940, all of which involves said matters and complainant will upon the court granting leave to amend bill of complaint in equity, set the said matters in the amended bill of complaint in equity for the purpose of the court making a lawful and equitable determination in an adjudication of the above entitled cause and action, and by making the aforesaid newly discovered defendants parties to the proposed amended bill of complaint in equity.

VI.

That any corporation stock of the capital stock of The Howard-Vaughan Co., Inc., a corporation, which has been in any manner held for the credit of the complainant hereof for any purpose [44] whatsoever, is merely a stock juggling fraud in a con-

spiracy and fraud to defraud complainant of his discoveries and inventions and of his constitutional rights relative to said discoveries and inventions, and thereby through the said corporation stock that the defendant James Westervelt endeavors to paint a picture as to its value, which said value to complainant is nil, because the said defendant James Westervelt has made his brags to various people, that he did not need complainant in any action he might prosecute, and he would see to it, that complainant would never get a dime, and complainant knows without any question of doubt, that the said defendant James Westervelt has for a long time and does now dominate and rule the directors of The Howard-Vaughan Co., Inc., a corporation, and complainant has been so informed from a reliable source, and therefore, any pleading that the said defendant James Westervelt, might allege that complainant has been given corporation stock of the said corporation for anything or purpose whatsoever, the said defendant has created such a condition that the stock would have no value to complainant, but instead would serve the purpose of said defendant to defraud complainant of his discoveries and inventions without due process of law and thereby cause irreparable injuries and losses and damages to complainant, and unconstitutionally deprive complainant of his constitutional rights as are afforded to all authors and inventors under a constitutional right of the United States of America.

Wherefore, complainant prays and respectfully

begs leave of the court to amend the bill of complaint in equity and to file the proposed amended bill of complaint in equity.

Dated: Los Angeles, California, January 8. 1940.

CALVIN S. MAUK

Solicitor for Complainant

Memorandum of Points and Authorities filed herewith and made a part hereof.

Nine (9) affidavits filed herewith and made a part hereof. [45]

State of California,
County of Los Angeles—ss.

Francis A. Howard, being by me first duly sworn deposes and says: That he is the complainant in the foregoing and above entitled cause and action; that he has read the foregoing petition to amend bill of complaint in equity and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

FRANCIS A. HOWARD

Petitioner

Subscribed and sworn to before me this 9th day of January, 1940.

[Seal] EDITH W. OLMSTEAD

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires July 22, 1942.

[Endorsed]: Filed Jan. 9, 1940. [46]

[Title of District Court and Cause.]

NOTICE OF MOTION & MOTION TO DENY AND DISMISS MOTION FOR SECURITY FOR COSTS AND MOTION FOR JUDGMENT ON THE PLEADINGS FOR DEFENDANTS MAKING SAID MOTIONS

To James Westervelt, Defendant, in Propria Persona, and as Attorney for Defendants, E. H. Archer and The Howard-Vaughan Co., Inc., a corporation; 440 19th Street, Santa Monica, California:

Please take notice that the complainant Francis A. Howard, will move the Court in the above entitled cause and action, on Monday, January 15th, 1940, at Ten (10:00) o'clock A. M., or as soon thereafter as counsel may be heard, for an order denying and dismissing motions for security for costs and for judgment on the pleadings as made by defendants. Said Motion will be made at the Courtroom of Honorable Leon R. Yankwich, Judge of the above entitled court, and said motion will be based upon the petition and motion to amend bill of complaint in equity filed and served in above entitled cause and action.

Dated: Los Angeles, California, January 8th, 1940.

CALVIN S. MAUK

Solicitor for Complainant and Petitioner

Petition to Amend Bill and Memorandum of Points and Authorities filed herewith in support of Petition to Amend Bill of Complaint made a part hereof.

[Endorsed]: Filed Jan. 9, 1940. [47]

[Title of District Court and Cause.]

MOTION TO DENY AND DISMISS MOTION FOR SECURITY FOR COSTS AND MOTION FOR JUDGMENT ON THE PLEADINGS FOR DEFENDANTS MAKING SAID MOTIONS

Comes now Francis A. Howard complainant and petitioner, who by and through his counsel Calvin S. Mauk, in the above entitled cause and action:

Moves the Court, that the Motions for security for costs and for judgment on the pleadings be denied and dismissed upon the grounds which is set forth in the petition to amend bill of complaint in equity and motion to amend said bill filed and served in above entitled cause and action.

Dated: Los Angeles, Calif., January 8th, 1940.

CALVIN S. MAUK

Solicitor for Complainant and Petitioner

Memorandum of Points and Authorities filed herewith in support of Petition to Amend Bill of Complaint made a part hereof, and said Petition to Amend Bill made a part hereof.

[Endorsed]: Filed Jan. 9, 1940. [48]

At a stated term, to wit: The September Term, A. D. 1939, of the District Court of the United States of America, within and for the Central Divi-

sion of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 15th day of January in the year of our Lord one thousand nine hundred and *thirty* forty.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

This cause coming on for hearing (1) defendant's motion for security for costs; (2) defendant's motion for judgment on the pleadings; (3) motion of defendants James Westervelt, Inc., James Westervelt impleaded, E. H. Archer, and the Howard-Vaughan Co., Inc., for summary judgment; (4) motion of the plaintiff to amend Bill of Complaint; (5) motion of the plaintiff to deny and dismiss motion for summary judgment; and (6) motion of the plaintiff to dismiss motion of defendants for security for costs; C. S. Mauk, Esq., appearing as counsel for the plaintiff; James Westervelt, Esq., appearing in propria persona, and as attorney for E. H. Archer, the Howard-Vaughan Co., Inc. no Court reporter being present:

Attorney Mauk asks time to reply to affidavit sworn to January 11, 1940, ruling being deferred to ascertain if reply affidavit is required.

Attorney Westervelt presents motion (3) of the defendants, James Westervelt, Inc., James Westervelt, impleaded, E. H. Archer, and Howard-Vaughan Co., Inc., for summary judgment. Attor-

ney Mauk replies and asks permission to file the Amended Bill attached to his motion. Attorney Westervelt argues in rebuttal. The Court makes a statement and analyses the said Bill and finds no requisite diversity of citizenship or questions arising under the patent law of the United States. The motion for Summary Judgment in favor of defendants is granted on the grounds that the action is foreclosed by the New Jersey Court judgment. Leave to amend the Complaint is denied.

Defendant's (1) motion for security for costs is dismissed; Motion (5) of the plaintiff to deny and dismiss motion for summary judgment is denied; and Motion (6) of the plaintiff to dismiss motion of defendants for security for costs is granted as question has become moot.

Attorney Westervelt will prepare order under the Rule. [49]

In the District Court of the United States, Southern District of California, Central Division

Civil Action
No. 634 Y Civil

FRANCIS A. HOWARD,

Complainant,

vs.

E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., a corporation, HOWARD F. ZAHNO also known as FRANCIS Z. HOWARD, JAMES H. MOYER, MARY M. VAUGHAN, JAMES WESTERVELT, CHARLES S. MACKENZIE, THOMAS MIDGLEY, JR., JAMES I. BOWERS, M. J. CRONIN and CHARLES LEVY, and fictitious named defendants,

Defendants.

JUDGMENT OF DISMISSAL

This matter being opened to the court on January 15, 1940, in court room No. 3, Honorable Leon R. Yankwich, Judge presiding, by James Westervelt, Esquire, attorney for himself in propria persona and for defendants E. H. Archer and The Howard-Vaughan Co., Inc., a corporation, and the matter coming on on said day upon the motions of said defendants for security for costs, for judgment on the pleadings and for summary judgment, and upon the motions of the complainant for leave to amend his

bill of complaint herein, supported by his petition to amend the same, and motions to deny the several motions of defendants, and the court having heard the arguments of the said James Westervelt, Esquire, counsel for the defendants appearing and of Calvin S. Mauk, Esquire, counsel for the complainant, and the court being satisfied and adjudging:

(1) That no cause of action cognizable in this court or in any court of the United States is set forth or stated in said bill of complaint;

(2) That no diversity of citizenship between the parties [50] hereto exists which would give this court or any court of the United States jurisdiction hereof;

(3) That the cause of action attempted to be set forth in the bill of complaint herein is barred by a previous adjudication of the Court of Chancery of New Jersey in action No. 120-704 in said court, wherein complainant herein was complainant and defendants The Howard-Vaughan Co., Inc. and Thomas Midgley, Jr. were among the defendants, in and by which it was adjudged by said Court of Chancery that complainant was not and is not the owner of said cause of action but that the same was owned and is owned by the defendant herein, The Howard-Vaughan Co., Inc., which said order and decree enjoined the complainant herein from bringing any action based upon a claim by him of ownership of said cause of action; and therefore that

(4) It would be and will be impossible for complainant to frame an amended bill of complaint based on said cause of action herein; and the court thereupon having found and ruled that the motion for security of costs had become a moot question and should be denied;

It is thereupon, on motion of the said James Westervelt, Esquire, Ordered, Adjudged and Decreed, that the defendants E. H. Archer, The Howard-Vaughan Co., Inc. and James Westervelt have judgment against the complainant herein, that said complaint be dismissed without leave to amend, and that the several motions of the complainant herein be denied and that said defendants have and recover from the complainant their costs herein to be taxed. Costs taxed at $30.50.

Dated: at Los Angeles, California, January 17th, 1940.

LEON R. YANKWICH

Judge.

Judgment entered Jan. 17, 1940. Docketed Jan. 17, 1940. Book C. O. 2 Page 490.

R. S. ZIMMERMAN,

Clerk

By LOUIS J. SOMERS,

Deputy

[Endorsed]: Filed Jan. 17, 1940. [51]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

Notice Is Hereby Given: That the complainant Francis A. Howard does hereby give Notice that he appeals from the judgment rendered by the District Court of the United States, Southern District of California, Central Division, to the United States Circuit Court of Appeals, Ninth Circuit, San Francisco, California, said appeal is taken from the judgment rendered in the above entitled cause and action, and appeals from the judgment of dismissal, denial of leave to amend bill of complaint in equity, and that said defendants have and recover from complainant their costs herein to be taxed, and appeals from the whole and entire judgment, which was entered on the 17th day of January, 1940.

Dated: February 13, 1940.

CALVIN S. MAUK,
Solicitor for Complainant.

Copy mailed Feb. 16, 1940 to James Westervelt, Esq., 416 W. 8th St., Room 514, Los Angeles, Cal.

R. S. ZIMMERMAN,
Clerk,
By E. L. S.
Deputy Clerk

[Endorsed]: Filed Feb. 15, 1940. [53]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The appellant in the above entitled cause and action in connection with appeal herein, presents and files therewith assignment of errors, as to which matters and things appellant states that the orders and decree of judgment entered in the above entitled cause and action are erroneous, to wit:

I.

The court erred, in dismissing bill of complaint in equity, upon the ground, that no cause of action cognizable in above entitled court or in any court of the United States, as set forth in the making, filing and entering of the judgment made and entered on January 17, 1940.

II.

The court erred, in dismissing bill of complaint in equity, upon the ground, that no diversity of citizenship between the parties exists which would give the court or any court of the United States jurisdiction, as made and entered in the judgment on January 17, 1940.

III.

The court erred, in dismissing the bill of complaint in equity, upon the ground, that the cause of action attempted to be set forth in the bill of complaint is barred by a previous adjudication of [55] the Court of Chancery of New Jersey in action No.

120-704 in said Court, as made and entered in the judgment on January 17, 1940.

IV.

The court erred, in dismissing bill of complaint in equity, upon the ground, that it would be impossible for complainant to frame an amended bill of complaint based upon said cause of action, as made and entered in the judgment on January 17, 1940.

V.

The court erred, in dismissing bill of complaint in equity, in denying leave to amend and to file proposed amended bill of complaint in equity, in making and entering the judgment on January 17, 1940, that said complaint be dismissed without leave to amend.

VI.

The court erred, in ruling no jurisdiction, and then holding that said defendants as mentioned in the aforesaid judgment on January 17, 1940, that said defendants have and recover from complainants their costs herein to be taxed.

Wherefore, complainant-appellant respectfully prays that the said orders and decree of judgment of the said District Court of the United States be reversed and that the matter be remanded to the said District Court with an order that appellant be allowed to file proposed amended bill of complaint in equity and proceedings be had thereunder in said District Court.

Dated: Los Angeles, California, February 21, 1940.

CALVIN S. MAUK,
Solicitor for Appellant.

[Endorsed]: Filed Mar. 13, 1940. [58]

[Title of District Court and Cause.]

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages, numbered from 1 to 60, inclusive, contain full, true and correct copies of Bill of Complaint; Substitution of Counsel; Answer of Defendants; Notice of Motion for Judgment on the Pleadings; Notice of Motion for Summary Judgment with Order Dismissing by Chancery Court of New Jersey; Notice of Motion & Petition to Amend, & Motion to Amend & Petition to Amend Bill of Complaint; Notice of Motion & Motion to Deny & Dismiss Motion for Security for Costs & Motion for Judgment on the Pleadings; Order for Judgment; Judgment of Dismissal; Notice of Appeal; Bond on Appeal; Assignments of Error; Designation of Contents of Record on Appeal and Affidavit of Service of Statement of Points and Designation of Documents, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I Do Further Certify that the fees of the Clerk for comparing, correcting and certifying the fore-

going record amount to $10.10, and that said amount has been paid me by the Appellant herein.

Witness my hand and the Seal of the District Court of the United States for the Southern District of California, this 23rd day of March, A. D. 1940.

[Seal] R. S. ZIMMERMAN,
Clerk
By EDMUND L. SMITH
Deputy Clerk.

[Endorsed]: No. 9480. United States Circuit Court of Appeals for the Ninth Circuit. Francis A. Howard, Appellant, vs. E. H. Archer, The Howard-Vaughan Co., Inc., a corporation, Howard F. Zahno, also known as Francis Z. Howard, James H. Moyer, Mary M. Vaughan, James Westervelt, Charles S. Mackenzie, Thomas Midgley, Jr., James I. Bowers, M. J. Cronin and Charles, Levy, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed, March 25, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

Civil Action No. 9480

FRANCIS A. HOWARD,

Appellant,

vs.

E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., a corporation, et al etc.,

Appellees.

STATEMENT OF POINTS.

Francis A. Howard, Appellant in the above entitled matter, presents points as follows:

Point 1.

That the Federal Court has jurisdiction of the above entitled cause, on the ground that a federal question is involved, wherein the inventions and discoveries belonging to appellant have been infringed upon by and through patents of certain defendants as set forth in bill of complaint in equity which shows that an infringement has been committed against discoveries and inventions of appellant.

Point 2.

That it is not necessary to show a diversity of citizenship in above entitled matter because the question of infringement relative to patents is a matter within the jurisdiction of the District Court of the United States.

Point 3.

That the action in the District Court is not barred by the previous adjudication of a State Court in the State of New Jersey, as it has no bearing on the federal question of infringement relative to patents and the discovery of fraud as alleged in the record which was discovered on January 3, 1940.

Point 4.

That complainant would be able to frame an amended bill of complaint in equity, based upon the infringement relative to patents, and also the discovery fraud on January 3, 1940, and also upon the provisions of the bill of complaint in equity providing for an amendment to bring in the fictitious named defendants.

Point 5.

That to deny leave to amend a bill of complaint in equity is a denial of due process of law, and in proceeding in equity such as the case at bar, a federal court in equity has jurisdiction over an infringement relative to patents and over fraud as set forth in the record.

Point 6.

That the court in ruling no jurisdiction had no jurisdiction to render a judgment that the defendants have and recover from complainant their costs and to be taxed for same.

Wherefore, appellant respectfully submits statement of points herewith and prays the Honorable

Justices of the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order and decree of judgment of the District Court below, and that the matter be remanded to the said District Court and that appellant be allowed to file proposed amended bill of complaint in equity and that proceedings be held thereunder in said District Court.

Dated: Los Angeles, California, Feruary 21, 1940.

CALVIN S. MAUK
Solicitor for Appellant.

[Endorsed]: Filed Mar. 25, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

To Clerk of the Above Named Court. The Complainant and Appellant Will Rely Upon, and Hereby Designates the Following Parts of the Record on Appeal.

1. Bill of Complaint.

2. Notice of Motion for judgment on Pleadings as made by answering defendants.

3. Notice of Motion for Summary Judgment as made by answering defendant.

4. Order dismissing by Chancery Court of New Jersey (copy of said order as filed by answering defendants.

5. Notice of Motion and Motion to Amend Bill of Complaint in Equity.

6. Petition to Amend Bill of Complaint in equity for Invalidation of Patent.

7. Answer of Defendants for answering defendants.

8. Notice of Motion and Motion to deny and dismiss Motion for summary judgment for Defendants making said motion.

9. Motion to deny and dismiss Motion for Summary judgment for defendants making said Motion.

10. Minute order by the Court dismissing Bill of Complaint.

11. Judgment made and entered by the District Court on January 17th, 1940.

12. Notice of Appeal.

13. Assignment of errors.

14. Statement of Points.

CALVIN S. MAUK
Solicitor for Complainant and Appellant.

[Endorsed]: Filed Mar. 25, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

United States of America
State of California
County of Los Angeles—ss.

C. S. Mauk, being first duly sworn says. That affiant is a citizen of the United States, a resident

of the County of Los Angeles, that affiant is over the age of eighteen and is not a party to the within and above entitled action, that affiant's business address is 408 South Spring Street in the city and county of Los Angeles, State of California, that on the 21st day of March 1940 affiant served the within Designation of Record on Appeal, in said action, by placing a true copy thereof in an envelope addressed to the Attorney of record as follows; James Westervelt, Attorney at Law 440 19th Street, Santa Monica, California, and *bt* then sealing said envelope and depositing the same, with postage thereon fully prepaid in the United States Post Office at Los Angeles, California where is located the residence of the Attorney for the persons by and for whom said service was made. That there is a delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

C. S. MAUK

Subscribed and sworn to before me this 21st day of March 1940.

[Seal] JOSEPH C. D. ROSS

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Mar. 25, 1940. Paul P. O'Brien, Clerk.

No. 9480.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS A. HOWARD,

Appellant,

vs.

E. H. [illegible], THE HOWARD-VAUGHAN CO., INC., a corporation; HOWARD F. ZAHN, also known as FRANCIS A. HOWARD; JAMES H. MOYER, MARY M. VAUGHAN, JAMES WESTERVELT, CHARLES S. MACKENZIE, THOMAS MIDGLEY, JR., JAMES I. BOWERS, M. J. CROSBY and CHARLES LEVY,

Appellees.

BRIEF OF APPELLANT.

CALVIN S. MAGE,
805 Continental Building, Los Angeles,
Solicitor for Appellant.

Parker & Baird Company, Law Printers, Los Angeles.

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No. 9480.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS A. HOWARD,

Appellant,

vs.

E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., a corporation; HOWARD F. ZAHNO, also known as FRANCIS Z. HOWARD; JAMES H. MOYER, MARY M. VAUGHAN, JAMES WESTERVELT, CHARLES S. MACKENZIE, THOMAS MIDGLEY, JR., JAMES I. BOWERS, M. J. CRONIN and CHARLES LEVY,

Appellees.

BRIEF OF APPELLANT.

Statement of the Case.

This is an appeal from the judgment and decree of the District Court of the United States for the Southern District of California, Central Division, in the above entitled matter, dismissing bill of complaint in equity, upon pleadings filed by appellees, and upon judgment of dismissal and denial of leave to amend bill of complaint by said court.

I.

The bill of complaint in equity for invalidation of patent, invalidation of unconstitutional contracts, conspiracy and fraud, etc. [Tr. of Record, p. 2], shows that the defendants (appellees) and fictitious named defendants as set forth in said bill of complaint in equity [Tr. of Record, p. 3, par. II] are made defendants in the above entitled matter upon grounds as set forth in the bill of complaint in the record hereof.

II.

The bill of complaint in equity further shows that the jurisdiction of said complaint in equity in above entitled matter, is based upon irreparable injuries, losses and damages in excess of and over three thousand ($3,000.00) dollars over and above all costs and attorney fees and that a federal question is involved in the matter of a patent and all rights in connection thereto, belonging to complainant, wherein said complainant has been unlawfully deprived of said rights in violation of constitutional, patent and federal law rights as set forth in bill of complaint in equity [Tr. of Record, p. 4, par. III].

III.

Appellant further shows that during the year of 1915 and also in 1916, that appellant discovered that tetraethyl lead when mixed in small quantities with any grade of gasoline, increased the efficiency of such gasoline when used as fuel for internal combustion engines and eliminated the knock in the motor and minimized the accumulation of carbon in the cylinders of the motor which occurred in the use of gasoline not so treated, also further discovered that tetraethyl lead when mixed with other certain other chemicals or reagents in relatively certain

quantities and under relatively certain quantities and conditions made a safe, efficient and very low priced chemical compound, which, when added to any grade of gasoline, increased the efficiency when used as fuel for internal combuston engines, eliminated the knock in the motor and minimized the accumulation of carbon in the cylinders which attended the use as motor fuel of gasoline not so treated [Tr. of Record, p. 5, par. V].

IV.

The record further shows, that the aforesaid complainant Francis A. Howard wrote out a formula in conformity with his aforesaid discoveries and inventions, and that in addition to the said discovery and invention of the use of tetraethyl lead, said complainant (appellant) also discovered the chief active ingredient and reagent employed in accomplishing the beneficial results as recited herein, and said formula contained several other ingredients and reagents, some of which were for the purpose of preventing precipitation, enabling the tetraethyl lead to act more efficiently and to bring about other beneficial results; some of which were intended to give to low grade gasolines an increased explosive force, a distinctive color and some of the ingredients for concealing the presence in said mixture of tetraethyl lead without interfering with the effectiveness thereof and to render impossible a complete analysis of said mixture of chemical compounds composing said formula and to prevent anyone from ascertaining by an analysis that the said mixture contained tetraethyl lead [Tr. of Record, pp. 5-6, par. VI].

V.

The record further shows that the aforesaid complainant (appellant) Francis A. Howard discovered and in-

vented a process and method of mixing aforesaid chemical combination, which made said discovery and invention safe to handle and aided the assimilation of the tetraethyl lead by the gasoline with which it was blended, and the formula of said discovery and invention was a secret formula and the chemical compound of said formula was given the name of "Vitigas" and under said name was manufactured and sold by appellant for several years thereafter, after the discovery and invention by appellant hereof [Tr. of Record, p. 6, par. VII].

VI.

The record further shows that on or about November 4, 1916, an application for registration of a trademark covering the use of "Vitigas" was filed in the United States Patent Office, and that on April 24, 1917, that the said trademark for use of "Vitigas" was registered in said United States Patent Office, and that on November 25, 1916, an application for registration in United States Patent Office for a label entitled "GARAGE VITIGAS" a chemical compound for use in blending gasoline, and that said application for registration was granted by the said United States Patent Office was granted and registration issued February 13, 1917, and said trademark "Vitigas and Garage Vitigas" was duly published as required by law [Tr. of Record, p. 7, par. VIII].

VII.

The record further shows that appellant Francis A. Howard, on January 25, 1918, filed an application in the United States Patent Office for Letters Patent of the United States for a "Process for the Extraction of Gasoline and Another Product from Kerosene," and that on November 12, 1918, Letters Patent was issued by said

Patent Office containing four claims [Tr. of Record, p. 8, par. IX] providing a means for recovering certain hydrocarbon distillates which were used as reagents in conjunction with, and to further and expedite the assimilation of certain other ingredients and reagents and lead compounds which composed the aforesaid secret formula for "Vitigas."

VIII.

The record shows that the defendant (appellee) Thomas Midgley, Jr., fraudulently, wrongfully and unlawfully filed numerous applications for patents, which were supported by perjury and fraud, in the defrauding appellant of his property, property rights and constitutional rights without jurisdiction and without due process of law [Tr. of Record, pp. 8, 9, 10 and 11, par. X], and by gaining entrance to appellant's laboratory, deliberately stole the discoveries and inventions of appellant.

IX.

The record further shows that on or about January 15, 1938, a conspiracy was entered into and has since continued to defraud appellant of his property and property rights without due process of law [Tr. of Record, p. 11, par. XI].

X.

The record further shows that several of the appellees conspired in a conspiracy to further defraud appellant of his property and property rights in violation rights as provided by the Constitution of the United States to appellant as an inventor in the discovery of scientific and useful arts, and as provided under the citizenship rights of appellant as an American citizens of the United States of America [Tr. of Record, pp. 11-12, par. XII], on various dates from December 15, 1937, to February, 1939.

XI.

The record shows, that on or about December 15, 1937, certain appellees, as set forth in the record, entered into a further conspiracy to defraud appellant of his property and property rights without jurisdiction and without due process of law, by purporting to hold meetings which were fraudulent [Tr. of Record, pp. 12-13, par. XIII].

XII.

The record further shows, that on or about December 28, 1937, that appellees as set forth in record, held fraudulent meetings for the purpose of adopting a contract obtained by fraud, thereby to deprive appellant of his property and property rights through and by the use of conspiracy and fraud [Tr. of Record, pp. 14-15, par. XIV].

XIII.

That on or about January 10, 1938, certain appellees as set forth in record, procured by conspiracy and fraud, certain personal property of appellant, and now hold in their possession said personal property, belonging to appellant, and said appellees have procured and are holding said personal property, thereby are depriving appellant of his property and property rights, without jurisdiction and without due process of law [Tr. of Record, pp. 15-16, par. XV].

XIV.

That on or about February 4, 1938, certain appellees held a meeting fraudulently for the purpose to defraud appellant of his property and property rights without jurisdiction and without due process of law [Tr. of Record, pp. 16-17, par. XVI].

XV.

That on or about February 17, 1938, that certain appellees as set forth in the record entered into a conspiracy to defraud appellant of his property and property rights against the provisions granted by the Constitution of the United States of America, wherein appellant has the right to promote the progress of science and useful arts, by securing to complainant (appellant) for limited times, and to authors and inventors the exclusive right to their respective writings and discoveries, and the said conspiracy and fraud deprives appellant of said rights without due process of law [Tr. of Record, pp. 17-18, par. XVII].

XVI.

That on or about March 16, 1938, appellees as set forth in record, further entered into a conspiracy to defraud appellant by fraudulently appointing trustees in a trust agreement for the purpose to fraudulently, illegally and unconstitutionally confiscate personal property and property rights of appellant, consisting of documents and corporation stock, and said confiscation was fraudulently executed, without jurisdiction and without due process of law [Tr. of Record, pp. 18-19, par. XVIII].

XVII.

That on or about March 16, 1938, appellees as set forth in record, further entered into a conspiracy to defraud appellant by holding fraudulent meetings for the purpose to defraud appellant of his property and property rights [Tr. of Record, p. 20, par. XIX].

XVIII.

That on or about February 25, 1939, appellees as set forth in record entered into a contract which is founded

upon the conspiracy and fraud set forth herein, for furthering the purpose to defraud appellant of his property and property rights without jurisdiction and without due process of law [Tr. of Record, pp. 20-21, par. XX].

XIX.

That on or about the 4th day of March, 1939, appellees as set forth in record, a certain contract was made and entered into fraudulently for the purpose to defraud appellant of his property and property rights without jurisdiction and without due process of law [Tr. of Record, pp. 21-22, par. XXI].

XX.

That on or about February 25, 1939, that a trust agreement was entered into and made upon the foundation of fraud, by certain appellees as set forth in the record, and through said trust agreement appellant was unconstitutionally deprived of his property and property rights without jurisdiction and without due process of law [Tr. of Record, pp. 22-23-24, par. XXII].

XXI.

That on or about the month of June, 1938, certain appellees as set forth in the record, filed an action in the Chancery Court of New Jersey, under the title of The Howard-Vaughan Co., Inc., a corporation, against various defendants, which said action is founded upon conspiracy and fraud, and said action is to further unconstitutionally confiscate the property and property rights of appellant without jurisdiction and without due process of law [Tr. of Record, pp. 25-26, par. XXIV].

XXII.

That the aforesaid appellees have caused irreparable injuries, losses and damages to appellant and threaten further irreparable injuries, losses and damages, through which it would be doubtful if any recovery could be made from the discoveries and inventions of appellant and thereby the property and property rights of appellant as an inventor and discoverer of useful and scientific arts would be unconstitutionally destroyed without jurisdiction and without due process of law [Tr. of Record, p. 26, par. XXV].

XXIII.

That on or about October 6th, 1934, the directors of The Howard-Vaughan Co., Inc., a corporation, held a meeting and passed a resolution, wherein the secret formula of appellant was assigned to said corporation and said assignment was accepted by said corporation upon certain conditions, which said conditions was not carried out by said corporation, and said resolution was made with the understanding that if the said conditions were not carried out that the said secret formula would be reassigned back to appellant, but instead of so doing, the said corporation has at all times and does now refuse to reassign said secret formula back to appellant [Tr. of Record, pp. 27-28, par. XXVI] and thereby the appellees as set forth in the record have through conspiracy and fraud deprived appellant of his property and property rights without jurisdiction and without due process of law, and the said unconstitutional confiscation of said secret formula, is the basis and foundation of the aforesaid action filed in the Chancery Court of New Jersey, which is a violation of the rights granted to appellant as an inventor and discoverer under the constitutional pro-

visions of the United States of America and the Federal Laws of the United States [Tr. of Record, pp. 27-28, par. XXVI].

XXIV.

Appellant prayed for judgment as set forth in the record which was denied by the court below [Tr. of Record, pp. 28-29-30].

XXV.

That on December 30, 1939, the defendants (appellees) E. H. Archer, The Howard-Vaughan Co., Inc., and James Westervelt, filed an answer to aforesaid bill of complaint in equity [Tr. of Record, pp. 31-44].

XXVI.

That on January 5, 1940, aforesaid appellees, E. H. Archer, The Howard-Vaughan Co., Inc., and James Westervelt, filed a notice of motion for judgment on the pleadings, supported by authorities, which are not applicable to the entitled cause and action [Tr. of Record, pp. 45-46].

XXVII.

That on January 5, 1940, appellees, E. H. Archer, The Howard-Vaughan Co., Inc., and James Westervelt, filed a copy of, on bill, etc., order dismissing bill of complaint, in Chancery of New Jersey, 120-704, which said copy is not certified [Tr. of Record, pp. 48-52].

XXVIII.

That on January 9, 1940, appellant filed notice of motion and petition to amend, and motion to amend and petition to amend bill of complaint in equity [Tr. of Record, pp. 52-53].

XXIX.

That on January 9, 1940, appellant filed motion to amend bill of complaint in equity [Tr. of Record, pp. 53-54].

XXX.

That on January 9, 1940, appellant filed petition to amend bill of complaint in equity for invalidation of patent, invalidation of unconstitutional contracts, conspiracy and fraud, etc. [Tr. of Record, pp. 54-61].

XXXI.

That on January 9, 1940, appellant filed notice of motion & motion to deny and dismiss motion for security for costs and motion for judgment on the pleadings for defendants making said motions [Tr. of Record, p. 62].

XXXII.

That on January 9, 1940, appellant filed motion to deny and dismiss motion for security for costs and motion for judgment on the pleadings for defendants making said motions [Tr. of Record, p. 63].

XXXIII.

That on January 15, 1940, the District Court, the Honorable Leon R. Yankwich, sitting as District Judge, made a minute order, as set forth in the record [Tr. of Record, pp. 63-65].

XXXIV.

That on January 17, 1940, judgment of dismissal, entered, docketed and filed by the Honorable Leon R. Yankwich, Judge of the District Court below [Tr. of Record, pp. 66-68].

XXXV.

That on February 15, 1940, appellant filed and served, Notice of Appeal to United States Circuit Court of Appeals, Ninth Circuit [Tr. of Record, p. 69].

XXXVI.

That on March 13, 1940, appellant filed assignment of errors [Tr. of Record, pp. 70-72].

XXXVII.

That on March 23, 1940, clerk of the District Court below, certified the record of the District Court below on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and also further certified that the fees of the clerk for comparing, correcting and certifying the foregoing record were paid by the appellant herein [Tr. of Record, pp. 72-73].

XXXVIII.

That on March 25, 1940, appellant filed statement of points [Tr. of Record, pp. 74-76].

XXXIX.

That on March 25, 1940, appellant filed designation of record on appeal [Tr. of Record, pp. 76-77].

XL.

That on March 25, 1940, solicitor for appellant filed affidavit of service by mail [Tr. of Record, pp. 77-78].

The foregoing statement of the case being set forth for the purpose of reversal upon appeal hereof from the aforesaid judgment of the District Court of the United States for the Southern District of California, Central Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

ARGUMENT.

POINTS AND AUTHORITIES.

Copyright Property and Property Rights Shown in Record.

On October 30, 1939, appellant filed a bill of complaint in equity for invalidation of patent, invalidation of unconstitutional contracts, conspiracy and fraud, etc., and said bill of complaint in equity averred that appellant Francis A. Howard, during the year of 1915 and in the early part of the year 1916, that he discovered that tetraethyl lead when mixed in small quantities with any grade of gasoline, increased the efficiency of such gasoline when used as fuel for internal combustion engines, eliminated the knock in the motor and minimized the accumulation of carbon in the cylinders of the motor which occurred in the use of gasoline not so treated, and further discovered that tetraethyl lead when mixed with certain other chemicals or reagents in relatively certain quantities and under relatively certain conditions made a safe, efficient and cheap chemical compound, which, when added to any grade of gasoline, increased its efficiency when used as fuel for internal combustion engines, eliminated the knock in the motor and minimized the accumulation of carbon in the cylinders which attended the use as motor fuel of gasoline not so treated, and said complaint in equity further shows that said appellant Francis A. Howard wrote out a formula in conformity with his said discoveries and inventions, and in addition to tetraethyl lead, the chief active ingredient or reagent employed in accomplishing the beneficial results such as set forth herewith, said formula contained several other ingredients or reagents,

some of which were for the purpose of preventing precipitation, enabling the tetraethyl lead to act more efficiently and to bring about other beneficial results, some of which were intended to give low grade gasolines an increased explosive force, one of which was for the sole purpose of giving to the mixture of said chemical compounds and to gasoline impregnated with it, a distinctive color and some other ingredients were employed for the sole purpose of concealing the presence in said mixture of tetraethyl lead and other ingredients, without interfering with the effectiveness thereof and to render impossible a complete analysis of said mixture of chemical compounds composing said formula and to prevent anyone from ascertaining by analysis that it contained tetraethyl lead, and appellant Francis A. Howard, on or about the same time as aforesaid, during the years of 1915 and 1916, that appellant discovered and invented a process and method of mixing said chemical combination, which rendered said mixing and mixture safe to handle and use and aided the assimilation of the tetraethyl lead by the gasoline with which it was blended and made its reaction more potent in accomplishing the results herein described, and the said formula is a secret formula, and to the chemical compound made pursuant to it was given the name of "Vitigas" and under that name it was marketed and sold after being manufactured by complainant (appellant) for several years thereafter, and the Constitution of the United States is very explicit in its declaration for the protection of authors and inventors in relation to discoveries and in-

ventions and rights to respective writings and discoveries, as it reads as follows:

> ARTICLE I, Sec. 8, Cl. 8 (Copyrights and Patents). Congress shall have the power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. (Const. U. S. A.)

And by the term "securing" an exclusive right is here intended, not the protection of an acknowledged legal right, but a future right:

> *Wheaton v. Peters,* 8 Pet. 591, 660 (1834).

And appellant wrote a formula which is a secret formula, which was written during the year of 1916, which at the time of writing said formula, it was an unpublished work, and under the Copyright Act of the United States of America it is provided:

> Title 17—Copyrights—Sec. 2. RIGHTS OF AUTHOR OR PROPRIETOR OF UNPUBLISHED WORK. Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor. (Mar. 4, 1909, c. 320, Sec. 2, 35 Stat. 1076.)

And under the provisions of the Copyright Act of the United States of America, it is further provided for the protection of appellant in his discoveries and inventions and the writing of aforesaid formula as written by appellant, and said protection to appellants reads as follows:

> Title 17—Copyrights—Sec. 23. DURATION; RENEWAL. The copyright secured by this title shall

endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: PROVIDED, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright; AND PROVIDED FURTHER, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered

therein within one year prior to the expiration of the original term of copyright; AND PROVIDED FURTHER, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication. (Mar. 4, 1909, c. 320, Sec. 23, 35 Stat. 1080.)

Authority for copyright in the United States exists as Congress has provided by legislation:

American Tobacco Co. v. Werckmeister, 207 U. S. 284 (1907).

And the power granted to Congress relative to copyright, "is domestic in its character and necessarily confined within the limits of the United States."

Brown v. Duchesne, 19 How. 183, 195 (1857).

And copyright is a species of property distinct from ownership of property used in making copies of the matter copyrighted and so held in the case of:

Stevens v. Gladding, 17 How. 447 (1855).

The bill of complaint in equity shows that the property and property rights of appellant was through the use of conspiracy and fraud unconstitutionally confiscated and that a part of the property and property rights was the aforesaid formula which is protected by the Copyright Act of the United States and the said authorities cited herewith.

Trademarks and Patents as Shown in Record.

On November 4, 1916, an application for registration of a trademark covering the use of the word "Vitigas" was filed in the United States Patent Office in the name of Howard-Vaughan Co., Inc., a corporation, and said trademark, numbered Serial No. 99086, was issued on April 24, 1917; and on November 25, 1916, appellant deposited in United States Patent Office for registration a label under the title of "Vitigas" a chemical compound for use in gasoline for purposes aforesaid, and said application was granted and issued by the United States Commissioner of Patents on February 13, 1917, to said corporation, numbered Serial No. 19885, and on all packages sold, a label was attached bearing a facsimile of said label registered in the United States Patent Office, so that the public could identify the goods and each package and container carried instructions thereon and said label was published as required by law, and on January 25, 1918, appellant filed an application in the office of Commissioner of Patents for Letters Patent of the United States on a "process for the Extraction of Gasoline and another Product from Kerosene," Serial No. 213,698, and said process patent was issued by the Commissioner of Patents on November 12, 1918, as United States Letters Patent No. 1,284,687, containing four claims; and said patent provided a means for recovering certain hydrocarbon distillates which were used as reagents in conjunction with and to further and expedite the assimilation of certain other ingredients and lead compounds which composed the aforesaid secret formula for "Vitigas," among said compounds in the said formula, tetraethyl lead was used in conjunction with other compounds and chemicals, which was well known by the defendant (appellee) Thomas

Midgley, Jr., that appellant was the discoverer and inventor of combining said chemical compounds with tetraethyl lead for the use in gasoline as hereinbefore set forth, and after the said Thomas Midgley, Jr., had fraudulently obtained said information, and for the purpose to confuse the issues, the said Thomas Midgely, Jr., applied for patents to the United States Patent Office on dates as follows, making claims as enumerated in each patent and in this fraudulent manner had patents issued as follows: January 7, 1918, he applied for patent which was granted as No. 1,296,832, issued March 11, 1919, in which said patent he made the principal claim which was for benzol blended with kerosene as an anti-knock preventer to be mixed with gasoline for use as a fuel for internal combustion engines; and on October 4, 1918, applied for another patent which was issued as No. 1,491,998, issued April 29th, 1924, in which said patent the principal claim was for benzine mixed with cyclohexane as a motor fuel; and on October 15th, 1920, another patent was applied for which was issued as No. 1,501,568, issued July 15, 1924. in which patent the principal claim was for aniline injection as an anti-knock resisting fluid; and on April 15th, 1922, filed an application for Letters Patent for what the said Thomas Midgley, Jr., wrongfully described as "Method and Means for Using Motor Fuels," for the first time set forth in the twenty-first claim, "A Fuel for Internal Combustion Engines Comprising Gasoline and Tetraethyl Lead," and patent thereon was issued to said Thomas Midgley, Jr., on February 23rd, 1926, as No. 1,573,846, and the said appellee Thomas Midgley, Jr., very well knew when he filed said application that appellant had in 1915 and 1916 discovered and invented the use of tetraethyl lead in gasoline and registered a trademark with Patent Office for purposes herein set forth,

and said Thomas Midgely, Jr., also knew that he was infringing on the trademark rights of appellant, and in filing his application for said patent and patents and executing the inventor's oath provided by law he further committed an infringement against the trademark rights and the discoveries and inventions of appellant, appellee has produced and sold appellant's rights all over the United States and thereby by fraud and perjury he unconstitutionally confiscated the property and property rights of appellant within a period of about two to eight years after appellant had made his discoveries and inventions, and said appellee has at all times since and does now continue the said unconstitutional confiscation of appellant's property and property rights without jurisdiction and without due process of law and thereby has at all times committed and does now commit and operate an infringement against the discoveries and inventions of appellant, by producing and selling said discoveries and inventions, and also against the rights granted to appellant under the trademark laws of the United States of America:

> Title 15—Commerce and Trade—Sec. 96. Evidence of ownership; infringement, and damages therefor. The registration of a trade mark under the provisions of this subdivision of this chapter shall be *prima facie* evidence of ownership. Any person who shall, without consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use,

or shall have used, such reproduction, counterfeit, copy or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian Tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs. (Feb. 20, 1905, c. 592, Sec. 16, 33 Stat. 728.)

And appellant is entitled to further protection against the fraud and infringement of said appellee against the trade mark rights of appellant, by the court issuing an injunction and the court may order a recovery and an assessment of damages against the said appellee in compensation for said infringement:

> Title 15—Commerce and Trade—Sec. 99 (Feb. 20, 1905, c. 592, Sec. 19, 33 Stat. 72), Code of Laws of United States of America.

And the court may order the destruction of infringing labels; service of injunction, and proceedings for enforcement, and said appellee has caused through assignment, conspiracy and fraud in conjunction with others to have tetraethyl lead labels and signs on thousands of gasoline service station pumps all over the United States in each and every state of the Union, which is violation against the trade mark rights and patent rights of appellant:

> Title 15—Commerce and Trade—Sec. 100 (Feb. 20, 1905, c. 592, Sec. 20, 33 Stat. 729; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167), Code of Laws of the United States of America.

And the court may declare interfering registered trade marks void and grant relief against such interference:

> Title 15—Commerce and Trade—Sec. 102 (Feb. 20, 1905, c. 592, Sec. 22, 33 Stat. 729), Code of Laws of the United States of America.

And appellant for several years manufactured and sold his trade mark product, and at common law the exclusive right to it grows out of its use and not its mere adoption, and during the time that that said manufacturing and sales were being made by appellant, the said appellee Thomas Midgley, Jr., committed the aforesaid infringement; and the present law is based upon the commerce power:

> *Warner v. Searle & H. Co.*, 191 U. S. 195 (1903).

And the aforesaid patents procured by the said appellee Thomas Midgley, Jr., are an infringement against appellant's rights, and when an infringement of patent is committed the injured party is entitled to damages therefor:

> Title 35—Patents—Sec. 67 (R. S. Sec. 4919); from Act July 8, 1870, c. 230, Sec. 59, 16 Stat. 207, Code of Laws of the United States of America.

And appellant may bring an action and may maintain a suit in law or equity in above entitled court on the ground of inadvertence, accident and mistake, and there has been no wilful default or intent to defraud or mislead the public, on the part of appellant:

> Title 35—Patents—Sec. 71 (R. S. Sec. 4922); Act of July 8, 1870, c. 230, Sec. 60, 16 Stat. 207, Code of Laws of the United States of America.

Conspiracy and Fraud Alleged in Bill of Complaint in Equity.

Conspiracy and fraud is charged in the bill of complaint in equity against several defendants as named in the record, and a conspiracy to injure persons in exercise of civil rights is a violation of Federal law against the civil rights of appellant:

> Title 18, Chapter 3, Section 51; R. S. Sec. 5508 (Mar. 4, 1909, c. 321, Sec. 19, 35 Stat. 1092). Code of Laws of the United States of America.

Fraud is alleged in the bill of complaint in equity, and courts of equity have jurisdiction to relieve in all cases of fraud:

> *Tyler v. Savage,* 143 U. S. 79 (12 Sup. Ct. 340), 36 L. Ed. 82.

Formula Belonging to Appellant Is Unlawfully Held by The Howard-Vaughan Co., Inc., a Corporation, Defendant Herein.

The bill of complaint in equity alleges that on or about October 6, 1934, the directors of The Howard-Vaughan Co., Inc., a corporation, held a meeting at Niagara Falls, N. Y., and at said meeting a resolution was passed by the said board of directors wherein the aforesaid formula belonging to appellant was transferred, assigned and said transfer and assignment was accepted by the said board of directors with the understanding that it was done to aid making a sale of the entire business to a prospective purchaser, and that if the proposed sale failed to consummate, that the said formula would be returned to appellant, and the said sale did not consummate, and the said corporation has at all times and does now refuse to re-

turn and deliver or reassign said formula to appellant, therefore, said corporation is using said formula to fraudulently sell the said formula which is being fraudulently held by said corporation; and a court of equity will interfere to prevent the consummation of a fraud:

> *Adams v. Gillig*, 199 N. Y. 314, 92 N. E. 670, 32 L. R. A. (N. S.) 127, 20 Ann. Cas. 910 (Aff. 131 App. Div. 194, 115 N. Y. S. 999).

And no matter what formal and proper proceedings surround a fraud, equity will disregard them all, if necessary, in order that justice and equity may prevail:

> *Wagg v. Herbert*, 25 U. S. 546, 30 Sup. Ct. 218, 54 L. Ed. 321,

and fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, which was justly reposed when the aforesaid formula was assigned to the aforesaid corporation, with the understanding that it would be reassigned if the proposed sale was not made, and the holding of said formula by the said corporation is injurious to appellant, and when an undue and unconscious advantage is taken of another such as has been done to appellant, courts of equity will not only interfere in such a case of fraud, but will also set aside all acts done, and they will also, if acts have by fraud been prevented from being done by the parties, equity will interfere and treat the case exactly as if the acts had been done:

> *Moore v. Crawford*, 130 U. S. 122, 128, 9 Sup. Ct. 447, 32 L. Ed. 878, 880;
>
> 1 *Story Eq. Jur.*, Sec. 187.

The Answer of Answering Defendants.

Upon aforesaid foundation of fraud, in the answer of defendants E. H. Archer, The Howard-Vaughan Co., Inc., and James Westervelt to the bill of complaint in equity, the said defendants set up as a defense, setting forth that appellant filed an action in Chancery of New Jersey, numbered as case No. 120-704, in which appellant was the complainant, and the defendants herein, The Howard-Vaughan Co., Inc., and Thomas Midgley, Jr., among other defandants, whereas, if it had not been for the inadvertence and mistakes made in the pleadings of said action in the said Chancery of New Jersey in said case, and the facts of fraud had been properly presented to the said Chancery Court of New Jersey, it is most certain that the said Chancery Court of New Jersey would have ruled in favor of appellant instead of in favor of the said Howard-Vaughan Co., Inc., a corporation, because if any one even a layman read the aforesaid resolution passed by the directors of said corporation on October 6, 1934, and discussed same with appellant, they would readily see that the said resolution was a conspiracy and fraud from start to finish for the sole purpose of defrauding appellant of his formula and all the rights granted to appellant by the Federal Laws of the United States of America, therefore, the defense conducted in said case in Chancery Court of New Jersey, was founded and based upon the fraud perpetrated in said resolution of October 6, 1934, passed by the said Howard-Vaughan Co., Inc., and aided by the said defendant James Westervelt, and any action founded upon said resolution of October 6, 1934, as passed by the said Howard-Vaughan Co., Inc., a corporation, is and would be fraudulent, even to the extent of practicing fraud upon the court that would sit on any

hearing based upon such a foundation for an action in any court, and the answer sets forth that an action is now pending before the Chancery Court of New Jersey, case No. 122-229, wherein The Howard-Vaughan Co., Inc., a corporation, is the complainant and the Standard Oil Co. (New Jersey), Standard Oil Company of New Jersey, General Motors Corporation, E. I. DuPont de Nemours & Co., Inc., *et al.*, are the defendants, and this said action pending before the said Chancery Court of New Jersey is founded and based upon the said resolution of October 6, 1934, and since the said resolution is a fraud, the said action before the said Chancery Court of New Jersey is also a fraud by the said Howard-Vaughan Co., Inc., a corporation, as the said corporation have no jurisdiction before any court to prosecute an action based upon a fraudulent resolution such as the fraud committed in said resolution of October 6, 1934, and this is the sole foundation of said action now pending before the said Chancery Court of New Jersey, and therefore the whole presentation before said court is fraudulent, and any judgment thus rendered upon a false, fraudulent, and fictitious record, such as would be founded upon aforesaid resolution for title to the said formula, does not possess any verity in law or equity, and can always be assailed in an independent suit brought by any party interested who did not participate in the fraud, or have any knowledge of it until after the judgment was obtained and became final:

Holton v. Davis (C. C. A. 9), 108 Fed. 138, 149,

and allegations of fraud on information and belief are sufficient and it has been held that such allegations are sufficient for the court to consider said allegations:

Holton v. Davis, supra,

and the Supreme Court has held the "fact of being a party does not estop a person from relief against fraud, as it is generally parties to the action that are the victims of fraud:

> *Johnson v. Waters,* 111 U. S. 640, 28 L. Ed. 547, 556,

and in the case of the judgment of the Chancery Court of New Jersey, rendered against appellant, such as mentioned in the answer of answering defendants, in the case of

> *Graver v. Faurot* (C. C. A. 7), 76 Fed. 257,

the court had before it a bill to enjoin a decree in equity by a state court.

Graver brought a suit in equity in the Superior Court of Cook County, Illinois, against Faurot, alleging fraud, and a violation of confidential relationship in the sale of $15,000.00 of stock to him. All of the evidence was in the hands of the defendants. They filed an answer denying the charge of fraud. The court dismissed the bill upon this answer. It was afterwards discovered that the answer was false, whereupon this action was brought in the Federal Court to set aside the former decree. The lower court had dismissed the complaint, and the Circuit Court of Appeals in reversing it, said:

> "There was in this case no trial. The complainant having failed to reply, and the case being submitted under the statute of the state which made the answer conclusive proof, there was no conflict nor weighing

of evidence. A decree for the respondents went as a matter of course. There was practically a default on the part of the plaintiff, brought about by the false answers and affidavits. Technically the answers were evidence at the hearing but before the hearing they served the distinct purpose of denying to the plaintiff information which the respondents were under duty to furnish, and so of depriving him, before the test of trial, of his standing in court. That was an extrinsic, collateral fraud, distinct from and antecedent to the use of answers as evidence at the hearing."

Graver v. Faurot (C. C. A. 7), 76 Fed. 257, 262,

and the court after stating the apparent conflict between the parties in the cases as follows:

United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93;

Marshall v. Holmes, 141 U. S. 589, 35 L. Ed. 870,

the court said:

"If there is here any inconsistency with the opinion in U. S. v. Throckmorton, to which reference was made, it was not the result of oversight, and ought perhaps to be regarded as an intentional modification of the earlier utterance. But whether there is conflict between the two opinions, or how they are to be reconciled, we need not consider. The present case, if we have properly interpreted the facts alleged, is distinguished from both, and rests upon an equity of which there can be no just denial. In reason and good conscience a decree obtained as this one is alleged to have been aught to be annulled. There can be no consideration of public policy or of private

> right on which it ought to stand. There can be and ought to be no repose of society where for such wrongs the courts are incapable of giving redress. The decree of the circuit court is reversed and the cause remanded with direction to overrule the demurrer to the bill."
>
> *Graver v. Faurot* (C. C. A. 7), 76 Fed. 257, 263,

and appellant herein is the legal, lawful and equitable owner of an action in the above entitled court against the defendants and each of them in the above entitled cause and action, which is based and founded upon the fraud perpetrated by the resolution aforesaid passed on October 6, 1934, by the aforesaid Howard-Vaughan Co., Inc., a corporation, and had the true facts been presented regarding all of the fraud surrounding the said resolution before the aforesaid Chancery Court of New Jersey, any and all actions before said court which were maintained and sustained by the said corporation, The Howard-Vaughan Co., Inc., said actions would have a ruling that the said corporation not only had no jurisdiction before said Chancery Court of New Jersey, but would have no jurisdiction before any court in the prosecution or defense of any action which was founded upon a resolution of the said corporation which was fraudulent, therefore the aforesaid cases are in point and answer the question before the above entitled court, and in a leading and outstanding case wherein a judgment was procured by fraud in a state court, where the parties to a successful judgment in the state court and in a suit in the Federal Court

were enjoined from taking advantage of their judgment rendered in the state; in the state court, the jury was deceived; the court was deceived; the witnesses, many of them, were deceived,—all by conspiracy and fraud, and the Federal Court before which the action was brought and submitted to the said tribunal and the truth of which was contested before it and passed upon by it, as the rule was stated in the case of

> *Hilton v. Guyot,* 159 U. S. 113, 207, 40 L. Ed. 95, 123, 16 Sup. Ct. Rep. 139,

which governed the ruling in the case before the court upon which it ruled, as in the case of

> *C. R. I. & P. Ry. Co. v. Callicotte,* 267 Fed. 799, 16 A. L. R. 386, 395, 396,

therefore, the order dismissing bill of complaint in Chancery of New Jersey, case No. 120-704, on account of the fraud under which said order and judgment was procured, it should be set aside and declared null and void, and the judgment in said case is void on its face, and a court has the power to set aside such a judgment at any time the subject is brought to its attention:

> *Marshall v. Holmes,* 141 U. S. 589, 35 L. Ed. 870.

and where a fraudulent advantage has been taken, which has been done to appellant herein, a court of equity will protect appellant by setting the aforesaid judgment aside:

> *Colby v. Title Ins. & Trust Co.,* 160 Cal. 632, 641, 643.

Appellant Filed and Served Motion and Petition to Amend Bill of Complaint in Equity.

On January 9, 1940, appellant filed and served notice and a motion and petition to amend bill of complaint in equity, and appellant alleged in said petition to amend bill of complaint in equity, that on or about Wednesday, January 3rd, 1940, that he had discovered a new and gigantic fraud which was involved in the matter before the court, and the bill also named many fictitious named defendants whose true and correct names and addresses had been discovered, which the appellant had substituted in the place of the said fictitious named defendants, and had the proposed amended bill of complaint ready to file and serve, and the District Court below refused to allow appellant to file the proposed amended bill of complaint in equity and dismissed the action, denying leave to amend which is a denial of due process of law and is a reversible error:

Kendig v. Deane, 97 U. S. 423;
Rogers v. Penobscot Mix. Co., 154 Fed. 606.

Jurisdiction.

The Federal Courts have exclusive jurisdiction of all cases arising under the patent-right or copyright laws of the United States:

Title 28—Judicial Code and Judiciary—Chap. 10, Sec. 371, Code of Laws of the United States of America.

And the Federal Court has jurisdiction of all suits at law or in equity arising under the patent, the copyright, and the trade mark laws:

Title 28—Judicial Code and Judiciary—Chap. 2, Sec. 41, subd. (7); R. S. Sec. 629, par. 9 (Mar. 3, 1911, c. 231, Sec. 24, par. 7, 36 Stat. 1092), Code of Laws of the United States of America.

And the Federal Court has jurisdiction for any violation of the provisions of the copyright laws to enter a judgment or decree enforcing the remedies provided under said laws:

> Title 17—Copyrights—Sec. 26 (Mar. 4, 1909, c. 320, Sec. 26, 35 Stat. 1082), Code of Laws of the United States of America.

The jurisdiction of Federal Courts in equity cannot be defeated or impaired by state statutes providing exclusive methods for settling estates, or undertaking to give exclusive jurisdiction to state courts:

> *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80;
>
> *Hayes v. Pratt*, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279.

An adequate remedy at law created by state statutes and available in state courts cannot oust the Federal Courts of jurisdiction in equity:

> *Smith v. Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140;
>
> *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

A court of equity has jurisdiction to protect property, even though in complying with the decree of the court to perform acts beyond the jurisdiction of the court:

> *Massie v. Watts*, 6 Cranch. 148, 157, 3 L. Ed. 181.

A court of equity concerns itself only in the protection of property rights and treats any civil right of a pecuniary nature as a property right:

In re Sawyer, 124 U. S. 200, 210, 8 Sup. Ct. 482, 31 L. Ed. 402.

It is the privilege and duty of a court of equity to supply the defect and furnish the remedy:

Morgan v. Beloit, 7 Wall. 614.

And equity may apply its own rule in all equity cases:

Kirby v. L. S. & M. S. Ry. Co., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569.

The foregoing and above entitled cause on appeal is based and founded upon the Constitution, Federal Laws, Rights, Privileges and Immunities granted by the Constitution and Federal Laws of the United States, and if the legislatures and the courts of the several states may at will annul the judgments of the courts of the United States, supported by the Constitution of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be depreciated by all; and the people of one state not less than the citizens of every other state, must feel a deep interest in resisting principles as destructive of the United States and its Constitution, and averting consequences as fatal to themselves; it was so held in the case of

United States v. Judge Peters (Cranch. 5), U. S. Reps. 9, p. 136.

Judgment of Dismissal.

The judgment of dismissal of the District Court below [Tr. of Record, pp. 66-68] in ordering, adjudging and decreeing that no cause of action cognizable in said or in any court of the court of the United States is set forth in bill of complaint, is erroneous upon the ground that the said bill in equity sets forth a federal question over which federal courts only have jurisdiction, relative to infringement involving copyright, patent and trade mark laws, and said bill sets forth conspiracy and fraud, which constitutes an action cognizable in the Federal Courts of the United States; the Federal Courts have jurisdiction of all suits at law or in equity arising under the patent, the copyright, and the trade mark laws:

> Title 28—Judicial Code and Judiciary—Chap. 2, Sec. 41, subd. (7); R. S. Sec. 629, par. 9 (Mar. 3, 1911, c. 231, Sec. 24, par. 7, 36 Stat. 1092), Code of Laws of the United States of America.

And allegations of fraud could have been considered and held sufficient in the hearing before the District Court below:

> *Holton v. Davis* (C. C. A. 9), 108 Fed. 138, 149.

The District Court below adjudging that no diversity of citizenship between the parties exists as a ground for judgment of dismissal is erroneous; when a federal question such as in the case hereof, the jurisdiction is governed by the federal laws and statutes heretofore cited relating to federal questions arising under the patent, the copyright, and the trade mark laws.

The District Court below adjudging that bill of complaint in equity is barred by a previous adjudication of

the Court of Chancery of New Jersey in action No. 120-704 in said court is erroneous because the bill of complaint in equity in above action hereof alleges that the said action No. 120-704 in the Court of Chancery of New Jersey was founded and based upon fraud, which is more fully set forth heretofore, and a judgment of a state court which is founded upon fraud, in a leading case the parties were enjoined from taking advantage of their successful judgment in a state court wherein the successful party had misrepresented the true facts to the court as has been done in the said case before the said Chancery of New Jersey, which is sufficient to undermine the judgment:

> *Chicago, Rock Island & Pacific Railway v. Callicotte* (C. C. A. 8), 267 Fed. 799, 16 A. L. R. 386.

The District Court below adjudging that it would be and will be impossible for complainant to frame an amended bill of complaint based on said cause of action herein, is erroneous because the bill in equity sets forth federal questions relating to patent, copyright and trade mark laws and infringements against appellant's rights under said laws, and where an infringement is committed the injured party is entitled to damages:

> Title 35—Patents—Sec. 67; R. S. Sec. 4919; Act of July 8, 1870, c. 230, Sec. 59, 16 Stat. 207.

The District Court in dismissing the bill of complaint in equity without leave to amend is erroneous and is a denial of due process of law, and is a reversible error:

> *Kendig v. Deane*, 97 U. S. 423;
>
> *Rogers v. Penobscot Mix. Co.*, 154 Fed. 606.

The District Court below in adjudging that the defendants have and recover from the complainant their costs herein to be taxed. Costs taxed at $30.50, is erroneous, because the court after dismissing the bill on the grounds of no jurisdiction, the said court would not have any power or jurisdiction to render a judgment for costs in favor of the defendants.

Assignment of Errors.

The assignment of errors [Tr. of Record, pp. 70-71, pars. I, II, III, IV, V, VI] reading as follows:

I.

> The court erred, in dismissing bill of complaint in equity, upon the ground, that no cause of action cognizable in above entitled court or in any court of the United States, as set forth in the making, filing and entering of the judgment made and entered on January 17, 1940.

II.

> The court erred, in dismissing bill of complaint in equity, upon the ground, that no diversity of citizenship between the parties exists which would give the court or any court of the United States jurisdiction, as made and entered in the judgment on January 17, 1940.

III.

> The court erred, in dismissing the bill of complaint in equity, upon the ground, that the cause of action attempted to be set forth in the bill of complaint is barred by a previous adjudication of the Court of Chancery of New Jersey in action No. 120-704 in said court, as made and entered in the judgment on January 17, 1940.

IV.

The court erred, in dismissing bill of complaint in equity, upon the ground, that it would be impossible for complainant to frame an amended bill of complaint based upon said cause of action, as made and entered in the judgment on January 17, 1940.

V.

The court erred, in dismissing bill of complaint in equity, in denying leave to amend and to file proposed amended bill of complaint in equity, in making and entering the judgment on January 17, 1940, that said complaint be dismissed without leave to amend.

VI.

The court erred, in ruling no jurisdiction, and then holding that said defendants as mentioned in the aforesaid judgment on January 17, 1940, that said defendants have and recover from complainant their costs herein to be taxed.

Summary of Assignment of Errors.

The assignment of errors under paragraph I of said assignment shows that the District Court below dismissed the bill of complaint in equity, upon the ground, that no cause of action cognizable in the above court or any court of the United States jurisdiction, as made and entered in the judgment on January 17, 1940, and the said complaint shows that the controversy involved in the above entitled is a federal question over an infringement under the Constitution of the United States, the copyright, patent and trade mark laws of the United States of America, and the discoveries and inventions of appellant, which said federal

question is a matter of federal jurisdiction under said laws:

Const. U. S. A., Art. I, Sec. 8, Cl. 8,

and the Federal Courts have jurisdiction of all suits at law or in equity arising under the patent, the copyright, and the trade mark laws:

Title 28, Judicial Code and Judiciary, Chap. 2, Sec. 41, sub. (7); R. S. Sec. 629, par 9 (Mar. 3, 1911, c. 231, Sec. 24, par. 7, 36 Stat. 1092), Code of Laws of the United States of America.

Under paragraph II of said assignment of errors, it shows that the court dismissed the bill of complaint in equity, upon the ground, that no diversity of citizenship between the parties exists which would give the court or any court of the United States jurisdiction: it is a well established fact and law, that when a federal question is involved relative to patents, copyrights and trade marks, that the jurisdiction rest with Federal Courts; and diversity of citizenship is not necessary:

Title 28, Judicial Code and Judiciary, Chap. 2, Sec. 41, subd. (7),

and the said federal law declares the extent of the judicial power of the United States Courts and which declare the supremacy of the authority of the National Government within the limits of the Constitution and Federal Laws as part of its general authority and the power to give effect to the judgments of the Courts of the United States which is coextensive with its territorial jurisdiction:

Atchison etc. R. Co. v. Sowers, 213 U. S. 55.

Under paragraph III of said assignment of errors, the court dismissed the bill of complaint in equity upon the ground that the cause of action attempted to be set forth in said complaint is barred by a previous action of the Court of Chancery of New Jersey in action No. 120-704 of said court, and the said complaint sets forth that the judgment of said court of New Jersey was procured from said court upon fraudulent representations to said court, therefore the said judgment having been procured by false testimony founded upon a fraudulent resolution of aforesaid Howard-Vaughan Co., Inc., a corporation, which is sufficient to undermine the said judgment, and such judgments of state courts have been enjoined and set aside in the Federal Courts:

> *Chicago, Rock Island & Pacific Railway v. Callicotte* (C. C. A. 8), 267 Fed. 799, 16 A. L. R. 386,

and allegations of fraud in a bill have been considered sufficient for a hearing before the District Court of the United States:

> *Holton v. Davis* (C. C. A. 9), 108 Fed. 138, 149.

And courts of equity have jurisdiction to relieve in all cases of fraud and the said complaint alleges fraud:

> *Tyler v. Savage,* 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82.

And the jurisdiction of Federal Courts is independent of that conferred upon State Courts:

> *Borer v. Chapman,* 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532.

Under paragraph IV of said assignment of errors, bill is dismissed upon the ground that it would be impossible for complainant to frame an amended bill of complaint based upon said action, and the bill shows that the controversy in said bill is a matter involving the discoveries and inventions of appellant, wherein appellant claims an infringement against his rights under the Constitution and Federal Laws, therefore, it is most possible that an amendment could be framed and the fictitious named defendants brought in as parties to the action, and also the parties involved in the gigantic fraud alleged to be discovered on January 3, 1940, after the said bill was filed in the District Court below, all of which involve an important federal question and therefore is of federal jurisdiction; and courts are not at liberty to decide a cause contrary to the provisions of the Constitution of the United States:

> *Cooley's Constitutional Limitations,* and cases cited (p. 159 *et seq.*),

and the Constitution of the United States is the fundamental law in opposition to which any order or law must be inoperative:

> *Cooley's Constitutional Limitations,* 4th Ed. 56 (*45).

The assignment of errors, under paragraph V, shows that the court dismissed the bill and denied leave to file proposed amended bill of complaint, which is a denial of due process of law and a reversible error; and such rul-

ing have been reversed and the cause remanded with directions for further proceedings in conformity with the opinion:

> *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 287.

Under paragraph VI of said assignment of errors, the court ruling no jurisdiction and dismissing the bill, then holding that defendants as mentioned in the aforesaid judgment on January 17, 1940, have and recover their taxing costs, it is most certain that if the court ruled it had no jurisdiction, that the said court would not have any jurisdiction to render a judgment for taxing costs in favor of defendants against appellant; the court was disqualified to render said judgment and said taxing cost judgment is void:

> *Deming v. McClaughry* (C. C. A. 8), 113 Fed. 639, 651;

and the same principle reaffirmed in

> *McClaughry v. Deming*, 186 U. S. 49, 46 L. Ed. 1049.

Statement of Points.

The statement of points [Tr. of Record, pp. 74-76] are made a part hereof just the same as if repeated in this brief hereof word for word as they read in the transcript of record hereof, and are supported by the foregoing points and authorities contained in this brief in its entirety hereof.

Designation of Record on Appeal.

The designation of record on appeal [Tr. of Record, pp. 76-77] upon which appellant relies upon on appeal hereof, are made a part hereof just the same as if repeated in this brief hereof word for word as they read in the transcript of record hereof, and are supported by the foregoing points and authorities contained in this brief in its entirety hereof.

Conclusion.

Wherefore, appellant respectfully submits the record, brief and all papers hereof, and prays that the judgment of the District Court below be reversed and that the matter be remanded to the District Court for further proceedings with the filing of the amended bill of complaint in equity.

Dated: Los Angeles, California, April 30, 1940.

Respectfully submitted,

Calvin S. Mauk,

Solicitor for Appellant.

No. 9480

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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Francis A. Howard,

Appellant,

vs.

E. H. Archer, The Howard-Vaughan Co., Inc., a corporation; Howard F. Zahno, also known as Francis Z. Howard; James H. Moyer, Mary M. Vaughan, James Westervelt, Charles S. MacKenzie, Thomas Midgley, Jr., James I. Bowers, M. J. Cronin and Charles Levy,

Appellees.

BRIEF OF APPELLEES E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., A CORPORATION AND JAMES WESTERVELT.

James Westervelt and
Mac A. Propp,
514 Commercial Exchange Building, Los Angeles,
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No. 9480

IN THE

United States Circuit Court of Appeals

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FRANCIS A. HOWARD,

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vs.

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Appellees.

BRIEF OF APPELLEES E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., A CORPORATION AND JAMES WESTERVELT.

PRELIMINARY STATEMENT.

The Bill of Complaint herein was filed by the complainant Francis A. Howard in *propria persona* and presents to Court and counsel the usual difficulties which occur when a layman attempts to draw his own pleadings.

Appellant in his brief herein cites some 53 authorities. each one of which states good law, but not a single one of which has any applicability whatever to the issues involved on this appeal.

The issues herein involved are so simple and elementary that we shall not burden the Court with any further argument as to appellant's brief, or by citing any authorities.

ARGUMENT.

There are but three points to be considered in deciding this case, as follows:

(1) Is there any Federal question involved which would give jurisdiction to Courts of the United States?

(2) Failing that, does the diversity of citizenship exist, which is necessary to give the Federal Courts jurisdiction?

(3) Is the complainant barred by *res adjudicata* because of the previous judgment against him in the Court of Chancery of New Jersey, which appears in the transcript at pages 48 to 52?

I.

No Federal Question Is Here Involved.

The Bill of Complaint so far as any head or tail can be made of it sounds solely in fraud of a civil nature. Furthermore, not one single fact is alleged in support of any one of the many ill assorted and wrongly joined charges of several different alleged conspiracies.

The only patent ever belonging to complainant mentioned in the bill [Paragraph IX, Tr. p. 8] is one which has long since expired so that any question concerning it has become moot. Even were this otherwise, all of the defendants except Midgley are improperly joined since they are not in anyway connected with the Midgley patent [Bill of Complaint, Paragraph X, Tr. pp. 8-11].

II.

There Is No Diversity of Citizenship, for It Affirmatively Appears [Bill of Complaint, Paragraphs I and II, Transcript p. 3] That Complainant and Defendants Archer and Westervelt Are Residents of Los Angeles County, California.

III.

Complainant's Action Is Barred by Res Adjudicata.

This action is based on a claim of ownership in complainant of the secret formula for "Vitagas" and the process of compounding same [Bill of Complaint, Paragraphs V, VI, VII, VIII, IX, Tr. pp. 5-8]. The action is, therefore, barred and furthermore expressly forbidden and enjoined, by the previous decree in New Jersey [Tr. pp. 48-52].

It will be noted that among the defendants in this action are included Thomas Midgley, Jr., and the Howard-Vaughan Co., Inc., both of whom appear as defendants in the New Jersey action. [Tr. p. 48.] An inspection of said New Jersey decree shows clearly that that action was based by complainant on the same claim to own the "Vitagas" formula as is here asserted and that defendant, the Howard-Vaughan Co., Inc., disputed that claim and asserted ownership thereof in itself. In the third paragraph of that New Jersey decree it is recited that the Court ordered that the parties during the hearing thereon might offer further evidence on "the issue as to whether the right to institute and maintain action * * * on the cause or causes of action mentioned and set forth in said Bill of Complaint, inheres in the said complainant or in the said defendant Howard-Vaughan Co., Inc." [Tr.

p. 49.] What those causes of action were, concerning the ownership of which issue was therein joined, fully litigated [Tr. p. 50] and decided, amply appears, beginning at the bottom of page 50 of the transcript, where the New Jersey Court ordered, adjudged and decreed "that the Howard-Vaughan Co., Inc., a corporation of the state of New York, one of the defendants herein, is the owner of the secret formula for a chemical compound called 'Vitagas,' described in the bill herein and of the process of compounding same, and that the Howard-Vaughan Co., Inc., * * * has the sole right to maintain any action or proceeding based upon such ownership." [Tr. bottom of p. 50 and top of p. 51.]

It is thus amply clear that the same claim of ownership of said secret formula was made in the New Jersey Court as is made here by complainant. Indeed paragraphs V-IX of the bill in this case are identical with corresponding paragraphs in the complainant's bill in New Jersey, as appears from a certified copy of the latter in possession of counsel for appellees herein. Same was produced in Court upon the hearing but the learned trial judge deemed it unnecessary to entertain it in view of the fact that the identity of complainant's claim of ownership of the said formula in this action and in the New Jersey action sufficiently appeared from what was already in the record.

In the New Jersey decree it was "further ordered, adjudged and decreed that the complainant, Francis A. Howard, be and he is hereby restrained and enjoined from bringing, prosecuting or maintaining any action in this court or in any court in this or in any other jurisdiction against the defendants mentioned in the bill of complaint, or any of them upon the cause of action set forth in the

bill of complaint filed herein, *or upon any cause of action based or founded upon any claim of ownership by said Francis A. Howard of the aforesaid secret formula* for a chemical compound called 'Vitagas' described in the bill of complaint filed herein and the process for compounding same." [Transcript page 51.]

So that if there were any doubts that the causes of action are the same in the two cases, the complainant is still under injunction to file the present action, because it is certainly founded upon a claim of ownership by Francis A. Howard of the secret formula for "Vitagas" and the process for compounding the same and it is sought to be maintained by him against the defendants Thomas Midgley and the Howard-Vaughan Co., Inc., both of whom were defendants in the New Jersey action.

The case is so abundantly clear and elementary that we do not burden the Court with any further argument.

IV.

The appeal should be dismissed with costs.

Respectfully submitted,

James Westervelt and
Mac A. Propp,

By Mac A. Propp,

Attorneys for Appellees.

514 Commercial Exchange Building, 416 West Eighth Street, Los Angeles.

No. 9480.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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FRANCIS A. HOWARD,

Appellant,

vs.

E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., a corporation; HOWARD F. ZAHNO, also known as FRANCIS Z. HOWARD; JAMES H. MOYER, MARY M. VAUGHAN, JAMES WESTERVELT, CHARLES S. MACKENZIE, THOMAS MIDGLEY, JR., JAMES I. BOWERS, M. J. CRONIN and CHARLES LEVY,

Appellees.

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Appellees.

REPLY BRIEF OF APPELLANT.

Counsel for appellees in their preliminary statement lay stress that appellant's complaint is filed *in propria persona* and counsel the usual difficulties which occur when a layman attempts to draw his own pleadings, and fails to add that the procedure of the above matter before the District Court below is in equity, and that a substitution of counsel for appellant shows in the record, and also an application by counsel to amend bill in the form of a motion to amend and a petition to amend the bill of complaint in equity, which was denied by the District Court below, and since equity is supreme to law

for the purpose of leveling off the inequalities of the law. for the sole purpose of protecting appellant against the thing counsel for appellees lay stress upon, namely, a layman writing his own pleadings, and the supremacy of equity over law is well established; and equity will allow a layman the privilege of counsel to correct.

> *Bennett v. Butterworth,* 11 How. (U. S.) 669, 31 L. Ed. 859.

See:

> *Cook, Powers of Courts of Equity,* 15 Columbia Law Review 235-238 (1915).

And to deny an application to amend a bill of complaint in equity and file a proposed amended bill is a denial of due process of law and a reversible error, and such denial has been reversed and the cause remanded with directions for further proceedings:

> *United States v. Lehigh Valley R. R. Co.,* 220 U. S. 287.

and if a layman files his own pleadings and makes a mistake, a mistake is not beyond the reach of equity for relief, as in the case of (6 Wheat. 174, 5 L. Ed. 589) the Supreme Court said:

> "He had found no case in the books in which it has been decided that a plain and acknowledged mistake of law was beyond the reach of equity,"

and equity will correct the mistake:

> *Hunt v. Adm'rs,* 1 Pet. 13 (U. S.),

and no one is allowed to enrich himself by a mistake at law or of fact:

> *Benson v. Bunting,* 127 Cal. 532, 59 P. 991, 78 Am. S. R. 81,

and fraud is alleged in bill of complaint in equity, and equity has jurisdiction to relieve in all cases of fraud:

> *Tyler v. Savage,* 143 U. S. 79 (12 Sup. Ct. 340), 36 L. Ed. 82.

Counsel for appellees, in their argument relative to the points to be considered, overlooked important facts as follows:

(1) The federal question involved for jurisdiction is, that the record shows that appellee Thomas Midgley, Jr., on February 23, 1926, was granted a patent known as patent No. 1,573,846, which is an infringement, interference and fraud against appellant in his discovery, invention, conception and reduction to practice, for the use of tetraethyl lead in gasoline for the beneficial purposes as set forth in the record, and the fraud surrounding the matter as set forth in the record is a federal question:

> *U. S. C.,* Title 35, Sec. 67 (Patents);
> *U. S. C.,* Title 35, Sec. 71 (Patents).

(2) Relative to diversity of citizenship, Howard-Vaughan Co., Inc., a corporation, is a corporation of the State of New York.

(3) Relative to a state judgment of Court of Chancery of New Jersey, and complaint barred by *res adjudicata,*

the record in complaint relative to this matter shows fraud and inadvertence, and the question of a state judgment obtained in such manner has been enjoined by federal court, and is settled in cases as follows:

> *Hilton v. Guyot,* 159 U. S. 113, 207, 40 L. Ed. 95, 123 (16 Sup. Ct. Rep. 139);
>
> *C. R. I. & P. Ry. Co. v. Callicotte,* 267 Fed. 799, 16 A. L. R. 386, 395, 396;
>
> *Marshall v. Holmes,* 141 U. S. 589, 35 L. Ed. 870;
>
> *Colby v. Title Ins. & Trust Co.,* 160 Cal. 632, 641, 643.

Conclusion.

Wherefore, appellant respectfully submits the record, brief, reply brief, and all papers in the files of the above-entitled matter, and prays that the judgment of the District Court below be reversed and that the matter be remanded to the District Court for further proceedings with the filing of the proposed amended bill of complaint in equity.

Dated: Los Angeles, California, June 6, 1940.

Respectfully submitted,

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